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52.21(b) (1980) 10

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JURISDICTION

The court of appeals denied rehearing en banc on August 30, 2005. This Court granted certiorari on May 15, 2006 (126 S. Ct. 2019). Jurisdiction rests on 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS

Relevant provisions of the Clean Air Act (Act or CAA), 42 U.S.C. 7401 *et seq.*, and of Title 40 of the Code of Federal Regulations are reproduced in an addendum to this brief.

STATEMENT

This case arises from an extensive "Plant Modernization Program" by which respondent Duke Energy Corporation (Duke) undertook to refurbish coal-burning power plants. Because of age and physical deterioration, these plants could operate only sporadically (and in some cases had been shut down for years) and, without modernization, they were due to be retired and replaced. The United States brought an enforcement action alleging that Duke's projects triggered the Act's Prevention of Significant Deterioration (PSD) provisions, which apply when a source undergoes a "modification," *i.e.*, "[a]ny physical change" that "increases the amount of any air pollutant emitted by such source." 42 U.S.C. 7411(a)(4), 7479(2)(C). The United States maintained that, under regulations promulgated by the Environmental Protection Agency (EPA) in 1980 and 1992 defining PSD modifications as physical changes that increase "actual" emissions, measured in "tons per year," a modernization that enables a source to operate more of the time – and emit more pollution – requires a PSD permit.

The Fourth Circuit held that the enforcement suit could not proceed, reasoning that Congress had required EPA to adopt a

regulatory test for PSD "modifications" identical to one the agency uses in regulations implementing the distinct New Source Performance Standards (NSPS) program. Under that NSPS standard, a modification cannot occur unless there is an increase in a source's maximum hourly emissions rate. Like other tests of emissions capacity or potential, that test excludes consideration of how much of the time (and how intensively) a source in fact operates. It thus exempts from PSD coverage the comprehensive overhaul of an old source – a source that, due to age and physical decay, was inoperative most or all of the time – even when the modernization project's result is to "increase[] the amount of any air pollutant emitted by such source" by hundreds or thousands of tons per year.

In imposing that result, the Fourth Circuit starkly violated Section 307 of the Act. That provision vests the D.C. Circuit with exclusive jurisdiction to review challenges to nationally applicable CAA regulations, and, in strong terms, disables courts in enforcement actions from deciding issues that could have been presented to the D.C. Circuit. 42 U.S.C. 7607(b), (e). The rationale the Fourth Circuit offered for finding the jurisdictional bar inapplicable – that the court was merely "interpreting" rather than invalidating EPA's regulations – does not withstand a moment's scrutiny. Even if courts were free to substitute their reading of a regulation for that of the agency, the court of appeals here did not actually "construe" the PSD regulations, whose language and preamble the court deemed "irrelevant" to the case because of what it saw as a peremptory *statutory* command. In fact, the PSD regulations manifestly cannot be "interpreted" to be the same as the NSPS regulations, or to impose an hourly rate test.

It would be hard to imagine a more serious affront to the exclusive review role Congress assigned to the D.C. Circuit. The 1980 regulations the Fourth Circuit found contrary to statute were, in relevant part, adopted to conform to the D.C. Circuit's decision in *Alabama Power v. Costle*, 636 F.2d 323 (1979), which construed the Act's PSD provisions to *mandate*

that EPA evaluate whether the program applies to physical changes by looking at their effects on "*actual* emissions," and held the PSD statute to *require* distinctive regulatory elements that the D.C. Circuit had held *unlawful* for NSPS. And the Fourth Circuit's decision was issued even as numerous parties, including Duke, were challenging the same regulations in the D.C. Circuit. In a decision rendered nine days after the Fourth Circuit's, *New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2005), the D.C. Circuit not only rejected (on merits and waiver grounds) the very statutory challenges Duke successfully pressed in the instant case, but also held, based in part on distinctive statutory requirements of the PSD program, that EPA *must* measure PSD modifications by increases in a source's "actual" emissions, not "potential" or "allowable" emissions.

Even if Congress had not been so clear in forbidding courts in enforcement actions from deciding broad statutory questions assigned to the D.C. Circuit, the interpretation imposed by the court below could not stand. EPA's regulatory test for PSD modifications – tailored to the D.C. Circuit's construction of the Act in *Alabama Power*, and upheld in full in *New York* – is easily a permissible reading of the statute, one carefully calibrated to the distinctive textual requirements and programmatic purposes of the Act's PSD provisions. Indeed, the Fourth Circuit did not identify the slightest inconsistency between EPA's regulatory test and the language of the statutory definition it implements.

Instead, relying on *Rowan Cos., Inc. v. United States*, 452 U.S. 247 (1981), the court of appeals invoked what it perceived as a congressional "mandate" on EPA to adopt identical regulatory definitions of source "modification" for the NSPS and PSD programs. But this Court has never – in *Rowan* or any other case – endorsed any such rigid presumption. To the contrary, the Court has consistently emphasized the need to interpret each term of a complex regulatory statute like the CAA in light of the specific statutory context in which it functions. As the D.C. Circuit

has held, EPA's regulations not only may but *must* give effect to the PSD provisions' distinctive and explicit targeting of the actual "tons per year" of pollution emitted by major emitting sources. The test urged by Duke and imposed by the court below (without consideration of its patent lack of fit with the PSD provisions of the Act) would exempt plant renovation projects that undeniably increase the amount of air pollutants emitted by a source by thousands of tons a year. That test is inconsistent with the plain text, intricate mechanics, and fundamental objectives of the statutory PSD program, and with D.C. Circuit holdings in jurisdictionally proper Section 307(b) rulemaking reviews.

A. Statutory And Regulatory Background

1. The 1970 Act. Congress enacted the Clean Air Act Amendments of 1970 "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. 7401(b). The CAA directs EPA to establish National Ambient Air Quality Standards (NAAQS) for air pollutants at a level requisite to protect public health and the welfare, *id.* 7409, and authorizes States to establish state implementation plans (SIPs) containing measures sufficient to achieve and maintain the NAAQS. *Id.* 7410. See *General Motors Corp. v. United States*, 496 U.S. 530, 533 (1990); *Union Elec. Co. v. EPA*, 427 U.S. 246, 249-50 (1976). EPA has promulgated NAAQS for various pollutants, including sulfur dioxide, nitrogen dioxide, and particulates. 40 C.F.R. pt. 50.

The 1970 Act also established the NSPS program, which directs EPA to prescribe uniform, national, technology-based performance standards for various categories of equipment. 42 U.S.C. 7411. The NSPS apply to newly constructed sources and to those that undergo "modification." 42 U.S.C. 7411(a)(2), (4). Believing that the controls required in the 1970 legislation would suffice to attain the NAAQS, Congress fixed 1975 as the deadline for meeting those standards. 42 U.S.C. 7410(b), (e), (f) (1970). That year

passed, however, with air quality in much of the country still not meeting them. See, *e.g.*, S. Rep. No. 95-127 at 55 (1977); 123 Cong. Rec. 18022 (June 8, 1977) ("record to date" under NSPS had been "disappointing") (Sen. Muskie).

2. The 1977 Amendments and the PSD Program. Responding to these widely recognized failures, Congress enacted the 1977 CAA Amendments, a "lengthy, detailed, technical, complex and comprehensive response to a major social issue." *Chevron USA, Inc. v. NRDC*, 467 U.S. 837, 848 (1984). Among their major innovations were two new programs, collectively referred to as New Source Review (NSR): the Nonattainment program (NNSR), codified in Part D of the Act, 42 U.S.C. 7501-7515, which applies to areas failing to meet the NAAQS, and the PSD program, codified in Part C, *id.* 7470-7492, which applies in areas where air quality satisfies those standards.

"Before 1977, no CAA provision specifically addressed potential air quality deterioration in areas where pollutant levels were lower than the NAAQS." *Alaska Dept. of Env'l Conservation v. EPA*, 540 U.S. 461, 471 (2004).[1] The PSD program's purposes include guarding against harms to public health and welfare anticipated to occur notwithstanding NAAQS attainment, protecting air quality in National Parks, and preventing large sources from harming air quality in downwind States. 42 U.S.C. 7470. Congress also established the program to insure "that economic growth will occur in a manner consistent with the preservation of existing clean air resources," and "that any decision to permit increased air pollution * * * is made only after careful evaluation of all the consequences" and based upon "informed public participation." *Id.* 7470(3), (5).

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[1] EPA established an administrative PSD program in 1974. 39 Fed. Reg. 42510 (Dec. 5, 1974). The statutory PSD program enacted in 1977 "follow[ed] the outline" of that program, but is "more elaborate and in many ways more stringent." 45 Fed. Reg. 52676, 52679 (Aug. 7, 1980).

The PSD provisions require permitting prior to construction or modification of "major emitting facilities," large factories and power plants "that emit, or have the potential to emit" 100 or 250 "tons per year" of a pollutant (depending on source type). 42 U.S.C. 7475(a), 7479(1). The permit process requires a "complete" assessment of baseline air quality in the locality and a prediction of the proposed project's effect on local air quality. *Id.* 7475(a), (e). An applicant must show that emissions will not "cause" or "contribute to" an exceedance of any applicable PSD "increment." *Id.* 7473, 7475(a)(3), (d). A "central feature" of the PSD program, *Alabama Power*, 636 F.2d at 374, increments are caps on increases in pollutant concentrations, the most stringent applicable in "class I" areas like National Parks. A source must employ the "best available pollution control technology" (BACT), identified "case-by-case" in light of local environmental and economic factors, *id.* 7475(a), 7479(3), and must comply with NSPS and other CAA requirements. *Id.* 7475(a)(3).

The NSR programs added in 1977 represented a significant departure from the 1970 Act's approach. Whereas NSPS sets categorical, national performance requirements for classes of equipment irrespective of size or location, NSR applies only to the nation's largest pollution sources and demands site-specific review, prior to construction activity, of projected effects on local air quality. See *Chevron*, 467 U.S. at 850 & n.24 (NNSR); *Alabama Power*, 636 F.2d at 346-51 (PSD).

Congress partially "grandfathered" sources built before August 7, 1977, from NSR requirements. See 42 U.S.C. 7475(a). It was widely believed, and asserted before Congress, that many existing plants had limited useful lives and would be shut down within a relatively short time. See, *e.g.*, H.R. Rep. No. 94-1175 at 159 ("electric utility industry" provided testimony that "it is imprudent to backfit FGD [a control technology] into existing plants, especially older units facing retirement within 10-15 years"); S. Rep. No. 95-127 at 128 (1977) ("There are in the United States approximately

200 old coal-fired power plants over 20 years of age. * * * Most will be totally phased out of operation in the next 5 to 20 years.") (additional views of Sen. Baker).

Congress provided, however, that NSR would apply to any "modification" of an existing source. For PSD purposes, "[t]he term 'construction,' when used in connection with any source or facility, includes the modification (as defined in section 7411(a) of this title) of any source or facility." 42 U.S.C. 7479(2)(C).[2] Similarly, under the NNSR program, "[t]he terms 'modification' and 'modified' mean the same as the term 'modification' as used in section 7411(a)(4)." *Id.* 7501(4). Thus, existing sources are subject to NSR when they undergo "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." *Id.* 7411(a)(4) (CAA Section 111(a)(4)). The PSD provisions contain a single, partial exemption for "modifications or expansions" where emissions are less than "50 tons per year." *Id.* 7475(b).

3. Judicial Review of CAA Rulemakings. Intended to promote "even and consistent national application" of EPA's implementing regulations and protect "the integrity of the time sequences provided throughout the Act," S. Rep. No. 91-1196 at 40-41 (1970), Section 307(b) of the Act describes the exclusive means of judicial review of CAA regulations and other EPA actions. See *Harrison v. PPG Industries, Inc.*, 446 U.S. 578 (1980); *Adamo Wrecking Co. v. United States*, 434 U.S. 275 (1978). Section 307(b)(1) provides that specified actions, including "any * * * nationally applicable regulations promulgated, or final actions taken, by the Administrator

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[2] The PSD provisions as enacted in August 1977 failed to specify that the term "construction" included modifications. Congress corrected that oversight in the Clean Air Act Technical and Conforming Amendments, enacted November 16, 1977, Pub. L. 95-190, § 14(a)(54), 91 Stat. 1402. See *New York*, 413 F.3d at 13; *Alabama Power*, 636 F.2d at 401 n.49.

under" the Act may be challenged "only" in the D.C. Circuit, by petition for review filed "within sixty days" of the promulgation or other final action, except that petitions "based solely on grounds arising after such sixtieth day" are considered timely if filed within 60 days of when those grounds arose. 42 U.S.C. 7607(b)(1). Section 307(b)(2) provides that "[a]ction of the Administrator with respect to which review could have been obtained [by such petition for review] shall not be subject to judicial review in civil or criminal proceedings for enforcement." *Id.* 7607(b)(2).[3] This prohibition applies "whether or not review was actually sought." *Harrison*, 446 U.S. at 605.

In 1977, Congress added Section 307(d)'s detailed requirements for CAA rulemakings, see 42 U.S.C. 7607(d)(1)(J) (PSD), and its prescription that only objections raised in the statutory public comment process or by petition for reconsideration are subject to judicial review, *id.* 7607(d)(7)(B). See *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1055 (D.C. Cir. 2001). The 1977 amendments also added Section 307(e), stating that "[n]othing in [the CAA] shall be construed to authorize judicial review" of EPA regulations or orders under the CAA, "except as provided in this section." 42 U.S.C. 7607(e).

4. *Alabama Power* and the 1980 Regulations. EPA issued initial regulations implementing the 1977 PSD provisions in 1978. 43 Fed. Reg. 26380 (June 19, 1978).

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[3] In 1977, Congress reaffirmed the importance of having the validity of national actions definitively settled by a court expert in administrative law and the CAA's complexities. It rejected a recommendation from the Administrative Conference "to permit the validity of regulations to be challenged in defense to an enforcement proceeding," 41 Fed. Reg. 56767, 56768 (Dec. 30, 1976), and amended Section 307(b) to *expand* the categories of actions subject to exclusive review. See Pub. L. 95-95 §§ 303, 305, 91 Stat. 685, 772, 776-77 (1977); H.R. Rep. No. 95-294 at 322 (1977) ("reaffirm[ing]" "intent to strictly limit Section 307 challenges"). See also *Harrison*, 446 U.S. at 584-85, 590-91. Congress did accept a recommendation to extend the time to seek review from 30 to 60 days.

Those regulations: (a) defined "modification" as a physical change that increases a source's "potential emission rate," *id.* at 26382; (b) adopted a qualified form of "netting" for measuring intra-source emissions increases (*i.e.*, subtracting contemporaneous decreases in emissions from increases at the source in determining whether a modification has occurred); and (c) restricted PSD applicability to changes that increased a source's potential emissions by at least 100 or 250 tons per year (depending on source type), *id.*

On review under Section 307(b), the D.C. Circuit issued an initial per curiam opinion, *Alabama Power Co. v. Costle*, 606 F.2d 1068 (1979), intended to guide ongoing EPA rulemaking to correct identified flaws in the 1978 rules while the court prepared its full opinion, *id.* at 1077. EPA published proposed regulations that would have confined PSD-triggering "modifications" to those physical changes which increased a source's "potential to emit" pollutants. 44 Fed. Reg. 51924, 51948 (Sept. 5, 1979). Soon thereafter, the D.C. Circuit issued its full decision, 636 F.2d 323 (1979), which explored the PSD enactment in detail.

The court held that EPA's exemption for projects that increased emissions by less than 100 or 250 tons per year was contrary to the Act's "clear language," explaining that:

> Implementation of the statute's definition of "modification" will undoubtedly prove inconvenient and costly to affected industries; but the clear language of the statute unavoidably imposes these costs except for de minimis increases. The statutory scheme intends to "grandfather" existing industries; but the provisions concerning modifications indicate that this is not to constitute a perpetual immunity from all standards under the PSD program. If these plants increase pollution, they will generally need a permit.

Id. at 400. The *Alabama Power* court also held that the distinctive purpose of the PSD provisions required that EPA provide for netting (the "bubble concept"), because "Congress intended to apply the permit process * * * only where

industrial changes might increase pollution in an area, not where an existing plant changed its operations in ways that produced no pollution increase." *Id.* at 401. Acknowledging that in *ASARCO, Inc. v. EPA*, 578 F.2d 319 (D.C. Cir. 1978), it had found EPA's use of a bubble concept *un*lawful for the NSPS program, the D.C. Circuit explained that the different results reflected the "significantly different" regulations and statutory programs at issue. While *ASARCO* had held the bubble to be "contrary to the intent of the NSPS," *Alabama Power* explained, netting was "precisely suited" to PSD's focus on actual consequences for local air quality. 636 F.2d at 402, 406. Cf. *ASARCO*, 527 F.2d at 327, 329.

EPA then promulgated new and extensively revised PSD regulations. 45 Fed. Reg. 52676 (Aug. 7, 1980). The 1980 regulations define a PSD "major modification" as "any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act." 40 C.F.R. 51.166(b)(2)(i) (1987).[4] This definition, like Section 111(a)(4) of the Act, requires two basic determinations: (1) whether a project constitutes a "physical change" (or "change in the method of operation") and (2) whether the change would result in an "increase" in emissions. EPA exempted some activities from PSD requirements at the first step, including certain everyday activities that would otherwise fit within the broad statutory language. Thus, the regulations define "physical change" and "change in the method of operation" to exclude, among other things, "routine maintenance, repair, and replacement," and an "increase in the hours or rate of operation." 40 C.F.R.

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[4] EPA promulgated separate sets of regulations, identical in relevant respects, for incorporation in SIPs, 45 Fed. Reg. at 52729-35 (40 C.F.R. 51.24(b) (1980) (recodified in 1987 at 40 C.F.R. 51.166(b) (1987)), and for areas without approved state plans, 45 Fed. Reg. 52735-41 (40 C.F.R. 52.21(b) (1980)). Following the practice of the courts below, see Pet. App. 5a, 36a, we cite to the regulations as recodified in 1987.

51.166(b)(2)(iii) (*a*), (*f*).[5]

As to the second step, the regulations define a "net emissions increase" as "any increase in actual emissions from a particular physical change or change in method of operation," together with "[a]ny other [contemporaneous] increases and decreases in actual emissions at the source." 40 C.F.R. 51.166(b)(3)(i)(*a*), (*b*).[6] Determining whether there has been an increase requires a source-wide assessment of the "extent that the new level of actual emissions exceeds the old level." *Id.* 51.166(b)(3)(v). The regulations specify that "actual emissions as of a particular date shall equal the average rate, in tons per year, at which the unit actually emitted the pollutant" during a preceding two-year or other period representative of normal source operation, and that "actual emissions" "shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period." *Id.* 51.166(b)(21)(i), (ii). They provide that for a unit which "has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date." *Id.* 51.166(b)(21)(iv).[7]

"Following the lead" of the D.C. Circuit's construction of the PSD provisions in *Alabama Power*, and the "language" of the statutory definition, EPA announced that it had "shifted the focus of its regulatory definitions from 'potential to emit'

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[5] The regulations also specify pollutant-specific, annual thresholds below which increases are not deemed "significant," and are therefore PSD-exempt. See, *e.g.*, 40 C.F.R. 51.166(b)(23)(i) (40 "tpy" (tons per year) thresholds for nitrogen oxides and sulfur dioxide).

[6] EPA's regulations for the NNSR program use the same test for "modifications." See, *e.g.*, 46 Fed. Reg. 36695, 36697 (July 15, 1981).

[7] The regulations provide that the potential to emit ascribed to a unit can be reduced upon the applicant's agreement to a permit limitation. 40 C.F.R. 51.166(b)(4). See *Puerto Rican Cement Co. v. EPA*, 889 F.2d 292, 297 (1st Cir. 1989). The D.C. Circuit has addressed the potential to emit concept in a number of cases. See, *e.g.*, *Nat'l Mining Ass'n v. EPA*, 59 F.3d 1351, 1361-65 (D.C. Cir. 1995).

to 'actual emissions.'" 45 Fed. Reg. at 52700 (discussing 636 F.2d at 400-01). Adoption of an actual emissions test avoided practical "problems" created by the 1979 proposal's "potential to emit" standard. 45 Fed. Reg. at 52700. Because "an existing source's potential emissions could give a figure considerably higher than what it is actually emitting," that test would yield "paper" reduction credits even as the actual emissions increased – "especially" if, prior to the change, the source "operated only a small part of the time." *Id.* EPA decided to avoid such "'paper offset[s],'" which "could permit actual air quality to deteriorate seriously, while the change which increased actual emissions avoided NSR." *Id.*

5. The *CMA* Litigation. Pursuant to Section 307(b), many parties – including respondent Duke's corporate predecessor – filed petitions for review challenging various aspects of the 1980 PSD regulations in the D.C. Circuit. *Chemical Manufacturers Ass'n v. EPA*, Nos. 79-1112, *et al.* See *New York*, 413 F.3d at 14-15. Certain petitioners – including General Motors and other major industrial firms – attacked EPA's use of an "actual emissions" test in place of the capacity-based test used in the 1978 PSD regulations and the 1979 proposal. Their brief raised as its first issue whether EPA exceeded its "statutory authority" by providing "that a modification subject to review under Parts C and D of the Clean Air Act would occur whenever actual emissions from a source increased as a result of an alteration to that source, even where the source's capacity to emit remains constant." Br. of Industry Pet'rs on Actual Emissions Definition of Net Increase at 1, No. 79-1112, *et al.* (dated Feb. 12, 1981; docketed Feb. 17, 1981).

The *CMA* proceedings were stayed for settlement discussions, which resulted in a 1982 agreement between EPA and certain petitioners – including Duke – under which EPA undertook to propose new regulations, with petitioners reserving the right to reopen their judicial challenge in the event those proposals were not adopted. See Settlement Agreement, D.C. Cir. Case No. 79-1112 (Feb. 22, 1982). The

regulatory changes, set forth in "Exhibit B" to the Agreement, see 61 Fed. Reg. 38250, 38268-69 (July 23, 1996), would have amended the emissions "increase" test "[b]y adding a new subparagraph (b)(2)(v)" to the 1980 PSD regulations providing that a modification "shall not be deemed to occur if one of the following occurs: (a) *there is no significant net increase in the source's potential to emit (as calculated in terms of pounds of pollutant emitted per hour) or* (b) there is no significant net increase in the source's actual emissions." *Id.* at 38269 (emphasis added). Exhibit B also called for EPA to propose "deleting" all 11 instances in which "actual" preceded "emissions" in EPA's regulatory definition of "significant net emissions increase." See *id.* & n.28. EPA published proposed regulations based on the Exhibit B language in 1996, but identified several ways in which such changes could impair the efficacy of the PSD program, 61 Fed. Reg. at 38269-70, and reached a final decision not to adopt the changes in 2002, 67 Fed. Reg. 80186, 80204-06 (Dec. 31, 2002), leading Duke and other petitioners in *CMA* to reopen their challenges to the 1980 rules.

6. Application of the 1980 Regulations. In *Puerto Rican Cement Co. v. EPA*, 889 F.2d 292 (1st Cir. 1989) (Breyer, J.), the First Circuit sustained an EPA determination that the PSD requirements applied to an upgrade project that increased "overall emissions" by enabling a facility to be used more intensively, even though the change did not increase its hourly emissions rate. *Id.* at 293, 297. After upholding EPA's application of its regulations to the project, *id.* at 297-98, the court, pointing to Section 307(b) and *CMA*, rejected as "obviously too late" a claim that the regulations were contrary to the Act. *Id.* at 299.

EPA addressed the 1980 regulations' application to the refurbishment of an old power plant in response to an applicability determination requested by the Wisconsin Electric Power Company ("WEPCo"). EPA rejected the utility's contention that *only* increases in the source's maximum emissions "rate" triggered PSD review, explaining

that "actual emissions are the product of" a source's emissions rate, the production rate, and hours of operation, and that "an increase in any one of these three specified factors, if attributable to a physical or operational change, can trigger an emissions increase for PSD purposes[.]" JA 294.

Reviewing that determination in *Wisconsin Electric Power Co. v. Reilly*, 893 F.2d 901 (7th Cir. 1990), the Seventh Circuit observed that the PSD and NSPS regulations measured emissions increases in "a fundamentally distinct manner" – the NSPS rules are "concerned primarily with increases in emissions rates, expressed in kilograms per hour," whereas the PSD rules are "concerned with changes in *total annual emissions*, expressed in tons per year," *id.* at 913, 915 (emphasis original). Recognizing that the emissions increase caused by WEPCo's renovations "would come not from an increase in emission rate, but rather from increases in production rate or hours of operation," *id.* at 916, the court rejected the utility's claim that its project was PSD-exempt under the regulatory language providing that increases in "hours of operation" or "production rate" do not themselves constitute a "physical change," explaining that the exemption "was provided to allow facilities to take advantage of fluctuating market conditions, not construction or modification activity." *Id.* at 916 n.11.

The court in *WEPCo* set aside EPA's application of the "actual to potential" test set forth in the 1980 regulations for sources that "have not begun normal operations," to calculate post-change annual emissions by assuming round-the-clock operation. While agreeing that EPA "cannot reasonably rely on a utility's own unenforceable estimates of its annual emissions," the court found that the record permitted a "'more realistic assessment'" of post-change emissions and remanded to EPA for such an assessment. 893 F.2d at 917 (quoting *Alabama Power*, 636 F.2d at 379); see also *New York*, 413 F.3d at 15. On remand, EPA estimated WEPCo's future annual emissions "based on all the available facts in the record," including how much the unit was likely to be used

after the improvements and at what production and emissions rates – a test referred to as the "actual-to-projected-actual" test – and found that, by that measure, a significant net emissions increase would occur for one pollutant but not for others. JA 68; see 57 Fed. Reg. at 32317 & n.10.

When Congress comprehensively amended the CAA in 1990, see Pub. L. No. 101-549, 104 Stat. 2399 (1990), it debated, but declined to adopt, proposals to amend the Act's PSD provisions to exclude modernization projects like the one at issue in *WEPCo*, including calls to enact a modification test that would only be triggered by increases in a source's "potential capacity" to emit.[8] However, Congress did amend the NNSR provisions, which, like the PSD provisions, incorporate Section 111(a)'s definition of "modification." 42 U.S.C. 7501(4). The 1990 revisions to the NNSR provisions – enacted in response to continuing failure to attain health-based air quality standards in many areas – reaffirmed NSR's focus on actual quantities of pollutants being released and their impacts on local air quality. Congress in 1990 ratcheted down the statutory thresholds,

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[8] An amendment offered by Senator McClure would have exempted any physical change to an "existing utility unit or source" from NSR unless it "increase[d] the maximum potential capacity of the unit or source to emit criteria air pollutants under its physical and operational design." Amt. No. 1404, Sec. 709(g), 136 Cong Rec. S3428 (daily ed. March 28, 1990). See also, *e.g.*, 136 Cong. Rec. S16904 (daily ed. Oct. 27, 1990); 136 Cong. Rec. S16914 (daily ed. Oct. 27, 1990); 136 Cong. Rec. S3383-84 (daily ed. M[illegible]28, 1990); 136 Cong. Rec. S3720 (daily ed. Apr. 3, 1990). The Conference Committee stated that failure to include such provisions in the final version of the bill was "not intended to affect or prejudice in any way the issues or resolution of the WEPCO matter." Joint Explanatory Statement to Accompany S. 1630, Rep. 101-952, 2d Sess. 344-345 (1990). Senator Mitchell observed while in 1970 "it was assumed that electric utility units had an average lifetime of 30 years," many utilities "are now choosing to extend the life of their plants,," thereby "exacerbat[ing]" pollution problems. 136 Cong. Rec. S16904 (daily ed. Oct. 27, 1990). See 136 Cong. Rec. S3723-25 (daily ed. Apr. 3, 1990) (Sen. Chafee); 36 Cong. Rec. S3383-84 (daily ed. Mar. 28, 1990) (Sen. Baucus).

expressed in tonnages of annual emissions, for applying NNSR, based on the severity of an area's pollution. NNSR in "serious" ozone nonattainment areas, for example, was expanded to apply to any source "that emits, or has the potential to emit, at least 50 tons per year." 42 U.S.C. 7511a(c); H.R. Rep. No. 101-490, at 234 (1990) ("regulation of smaller sources is essential for attainment in heavily polluted areas"). The 1990 amendments directed that owners of a modified source "shall assure that the total tonnage of increased emissions of the air pollutant * * * shall be offset by an equal or greater reduction * * * in the *actual* emissions of such air pollutant." *Id.* 7503(c)(1) (emphasis added).

7. The 1992, 1996 and 2002 Rulemakings. After the *WEPCo* decision, EPA adopted regulations that, among other things, addressed the means of calculating post-change emissions for PSD modifications. 57 Fed. Reg. 32314 (July 21, 1992). The 1992 regulations left in place the 1980 regulations' measure of emissions in terms of "actual" emissions measured in "tons per year," and the express requirements that the pre-change baseline take account of the source's hours of operation and production rates. The 1992 PSD regulations added to that test a provision allowing electric utilities to measure post-change emissions using "representative annual emissions" – defined as "the average rate, in tons per year, at which the source is projected to emit a pollutant for the two-year period after a physical change * * * considering the effect any such change will have on increasing or decreasing the hourly rate and on projected capacity utilization," 40 C.F.R. 51.166(b)(32) (1993) – so long as the owner or operator then submits annual emissions data for five years following resumption of regular operations to verify its projection. 40 C.F.R. 51.166(b)(21)(v) (1993).[9]

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[9] The agency explained that its "extensive experience with electric utilities, and the generally similar nature of operations within this source category, provide EPA an adequate basis on which to predict future actual emissions from such units in most cases." 56 Fed. Reg. 27630, 27631

Having formally proposed the regulatory changes in the *CMA* Exhibit B in 1996, 61 Fed. Reg. 38250 (July 23, 1996),[10] EPA rejected them in a 2002 NSR rulemaking. EPA reiterated concerns it expressed in 1996 about the effects of such a change on the PSD program, and noted comments from States and others that the proposal would frustrate SIP administration, lead to overconsumption of PSD increments and to nonattainment backsliding, and "virtually eliminate NSR in most modification cases." 67 Fed. Reg. at 80205. EPA declined to adopt Exhibit B, concluding it "could lead to unreviewed increases in emissions that would be detrimental to air quality" and "make it difficult to implement the statutory requirements for state-of-the-art controls." *Id.* Duke and other utility petitioners moved to reopen the D.C. Circuit *CMA* proceedings, which were consolidated with challenges to the 1992 and 2002 PSD regulations.

8. D.C. Circuit Proceedings. On June 24, 2005, the D.C. Circuit upheld the 1980 PSD modification regulations against

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(June 14, 1991) (proposed rule). EPA distinguished the different tests used under NSPS and PSD, 57 Fed. Reg. at 32316, and discussed the test under 1980 PSD regulations in detail, *id.* at 32316-18.

[10] In the 1996 notice, EPA explained that the effect of the Exhibit B language would be to "eliminate a source's level of operations as a factor when determining whether a proposed change will result in an increase," and that if "[p]ast and future levels of utilization of the source are completely disregarded * * * an existing source could make any change so long as the change does not significantly increase the source's hourly potential emissions rate." 61 Fed. Reg. at 38269. Such an approach would allow a source to avoid PSD for physical changes that allow it to operate "at much higher levels (*e.g.*, more hours per day or week) than it had in the past," with the result that "actual emissions (measured in tpy [tons per year]) could more than double due to the increase in utilization even though hourly potential emissions remain the same" – a "particular concern" in the case of "older sources," of which the impact had "never been assessed." *Id.* EPA also determined that Exhibit B's rejection of an actual emissions test might "conflict" with the 1990 Amendments' NNSR provisions, under which "offsetting emissions reductions .* * * must be calculated in terms of *actual* emissions." *Id.* at 38269 n. 31 (emphasis added) (citing 42 U.S.C. 7503(c)). See *supra*, pp. 15-16.

the revived challenges of a utility industry coalition that included Duke. *New York*, 413 F.3d 3. The court rejected petitioners' argument that Congress, by incorporating into the PSD program the *statutory* definition of "modification" set out in the 1970 Act's NSPS provisions, intended to impose for the statutory PSD program a "modification" definition set forth in EPA's pre-1977 NSPS *regulations*, which gauged modifications by increases in hourly emissions rate. 413 F. 3d at 19-20; see also *id.* at 18 (noting that the industry petitioners "challenge the 1980 rule's definition of modification in the NSR context to the extent that it differs from the NSPS definition"). The D.C. Circuit explained that it "ha[d] (naturally) required indications in the statutory language or history to infer that Congress intended to incorporate into a statute a preexisting regulatory definition," and that, in the case of the 1977 PSD enactment, it found none. *Id.* at 20. The court also observed that when the PSD provisions were enacted in 1977, EPA's NSPS regulations contained two *different* and "possibly inconsistent" regulatory definitions for "modification," *id.* at 19,[11] and that the regulatory definitions for NSPS and EPA's 1974 administrative PSD program "already differed" at that point. 413 F.2d at 12. Noting that industry had made "no attack at all on the reasonableness of EPA's definition of modification for NSR (apart from its divergence from one of the 1975 NSPS definitions)" the court "reject[ed] this portion of industry's challenge to the 1980 and the 2002 rules." *Id.* at 20.

The *New York* court returned to the statutory "modification" definition in striking down portions of EPA's 2002 regulations exempting certain projects from NSR "even if the change increases the source's net actual emissions."

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[11] NSPS regulations in place in 1977 contained one provision (in place with minor changes since 1971, see 36 Fed. Reg. 24876, 24877 (Dec. 23, 1971)), with language tracking the statutory definition, 40 C.F.R. 60.2(h) (1976), and another prescribing an hourly rate standard, *id.* 60.14(b). See 40 Fed. Reg. 58416, 58416-17 (Dec. 16, 1975).

413 F.3d at 38. Examining the text of the definition and other PSD provisions, the court held that the "plain language of the CAA indicates that Congress intended to apply NSR to changes that increase actual emissions instead of potential or allowable emissions." *Id.* at 40.

B. Factual Background and Proceedings Below

1. Duke's Plant Modernization Program. This case concerns significant rehabilitation projects at eight of Duke's plants in the Carolinas. See Pet. App. 26a-28a. The units began service between 1940 and 1975, and had, by the 1980s, become so debilitated that a number were removed from Duke's installed generating capacity because "they no longer [could] provide reliable service." *State ex. rel. Utilities Comm. v. Eddleman,* 358 S.E.2d 339, 348 (N.C. 1987). Duke's CEO testified to South Carolina utility officials about the "geriatric condition" of Duke units, JA 201, stating they were "no longer reliable because of their age and condition," and that "[h]istorically, units of this age and condition would be retired and scrapped." Pet. App. 28a; JA 204; see *Eddleman,* 358 S.E.2d at 349 ("'Ordinarily, plants of this age and condition are retired and replaced by new capacity.'") (quoting and upholding N.C. Utilities Commission finding regarding the Duke plants).

In 1985, Duke embarked on what it called its "Plant Modernization Program" (PMP), aimed at "refurbish[ing]" projects it had taken off line, JA 224, so they could "operate safely, reliably, and cost effectively for an additional 20 years." Pet. App. 28a; see JA 232. Duke's project manager described the modernization of one of the facilities, Unit 4 of the Buck Steam Station, as equivalent to taking a 1932 Ford and "rebuild[ing] it completely" so that it could run "from here [North Carolina] to Denver every day." U.S. Summ. J. Ex. 24 at 25 (Milton Starnes Dep. 25:16).[12] Duke's PMP

[12] Duke's prescribed "major rehabilitation" for its plants included, for example, replacement of "[m]ajor portions of the boiler water walls of the boiler superheater and of the drum circulation system" at Buck 4, as well

strategy was to "[c]apitalize all expenditures" of PMP, JA 230, with "rehabilitation and upgrading" projects completed over a number of years to make "the extended operating life of the rehabilitated units a cost-effective alternative to the addition of new capacity." JA 232.

Duke's target for PMP projects was improving a unit's availability for service to a range of 80-85%. JA 230. But no such heavy utilization was needed to yield a significant increase in emissions. Duke's expert testified that the Buck 4 unit, which did not operate at all for 10 years prior to and during the PMP, would need to operate for only 151 hours – less than seven days – to increase sulfur dioxide emissions by 40 tons per year, the threshold for a significant increase under the PSD regulations,[13] while the United States' expert projected that Buck 4's post project emissions would increase by 873.2 tons per year.[14]

2. District Court Proceedings. In December 2000, the United States filed an enforcement action against Duke pursuant to Sections 113(b) and 167 of the CAA, charging that Duke had violated the Act by engaging in 29

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as manufacture and installation of new generator coils and replacement of condenser tubes (JA 206-07); for Buck 3, complete "rewinding" of a "condemned" generator rotor "too dangerous to operate under circumstances" as well as "major replacements of the boiler" (JA 206); and, for Allen 2, "modifications and upgrading" of the boiler, replacement of a precipitator, replacement feed water heaters, and a "completely rewound" generator stator with "new copper coils, insulation, and the works" (JA 206). Duke was "counting on total rehabilitation, or there was no way" its older units could make it into the 21st Century. JA 210.

[13] U.S. Ex. 96 (Ex. FCG-5 to Expert Report of Frank C. Graves).

[14] JA 445 (Comparison Test 2). Buck 4 resumed commercial operations on January 1, 1995, CA4 JA at 790, without having undergone NSR and without any PSD pollution controls. EPA's online Unit Emissions Report for Buck 4 reports that, in 2003, Buck 4 operated 5,132 hours and emitted 1,095 tons of SO_2. See http://cfpub.epa.gov/gdm/index.cfm (quick reports, unit level emissions report, acid rain database, facility name "Buck," Unit ID "7") (last visited July 15, 2006). Unlike the parties in *Puerto Rican Cement* and *WEPCo*, Duke never sought an applicability determination.

"modifications" without obtaining PSD permits required under the Act and the applicable state implementation plans.[15] Petitioners intervened as plaintiffs. Plaintiffs submitted that Duke's extensive refurbishments resulted in large increases in emissions and constituted modifications under the governing PSD regulations.[16] Among other defenses, Duke countered that a PSD "increase" could not occur absent an increase in hourly emissions rate. Pet. App. 58a-59a.

The district court sided with Duke, and concluded that the "PSD statutory definition [of modification] incorporated not only the NSPS statutory definition of modification, but also the regulations implementing the NSPS program," Pet. App. 35a, see *id.* 67a, and, further, that Duke's post-PMP emissions had to be calculated by "assuming the same pre-project" hours of operation, meaning that "only if the project increases the hourly rate of emissions will there be an annual emissions increase." *Id.* 59a-60a. Although the PSD regulations require comparison of annual, rather than hourly emissions, the court reasoned that consistency could be achieved by "annualizing" the hourly rates -- *i.e.*, assuming that the plant would operate the same pre-project number of hours, even for changes

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[15] This is one of a number of NSR enforcement cases involving major renovation projects at older coal-fired power plants. See, *e.g.*, *United States v. Cinergy*, 397 F. Supp. 2d 1025 (S.D. Ind. 2005), *appeal pending* (7th Cir. No. 06-1224); *United States v. East Kentucky Power Co-op.*, Civ. No. 04-34 (E.D. Ky.) (filed 2004); *United States v. American Elec. Power Serv. Corp.*, Civ. No. C2-05-360 (S.D. Ohio) (filed 2005). Because those sources account for a large share of emissions of pollutants such as sulfur dioxide (SO_2) and nitrogen oxides (NOx), see, *e.g.*, General Accounting Office, *Air Pollution Emissions from Older Electric-Generating Units*, No. GAO 02-709, 2-3, 20-21 (2002); Jonathan Levy and Jack Spengler, Health Benefits of Emissions Reductions from Older Power Plants, 9 RISK IN PERSPECTIVE 1 (2001), and because BACT typically reduces emissions dramatically, see 71 Fed. Reg. 9866, 9871 (Feb. 27, 2006), NSR enforcement carries substantial benefits for air quality and public health.

[16] In 1982, EPA approved North and South Carolina's incorporation of the 1980 PSD regulations into their respective SIPs, 47 Fed. Reg. 7836 (Feb. 23, 1982) (NC); 47 Fed. Reg. 6017 (Feb. 10, 1982) (SC).

whose very purpose was to support increased operations. The court found support for an hourly rate test in the regulatory language providing that increases in "hours of operation" would not count as "physical changes" or changes in a source's "method of operation." *Id.* 58a-59a. Plaintiffs stipulated that Duke's refurbishments would not cause a PSD-triggering "net emissions increase" under the district court's hourly rate test, and based on that stipulation, the district court entered final judgment for Duke. Pet. App. 87a.

3. Fourth Circuit Proceedings. On June 15, 2005, the Fourth Circuit affirmed the judgment for Duke. It did not adopt the district court's regulatory ratification theory. Instead it reasoned that "because Congress mandated that the PSD definition of 'modification' be identical to the NSPS definition of 'modification,' the EPA cannot interpret 'modification' under the PSD inconsistently with the way it interprets the term under the NSPS." Pet. App. 11a (footnote omitted). The panel relied on *Rowan*, 452 U.S. 247, a case it had ordered the parties to brief after oral argument. Pet. App. 11a-12a n.4, 21a. The Fourth Circuit read *Rowan* to teach that "when Congress itself provided 'substantially identical' statutory definitions of a term in different statutes, the agency charged with enforcing the statutes could not interpret the statutory definitions 'differently.'" *Id.* (quoting 452 U.S. at 257); see Pet. App. 14a (concluding that Congress "intended the statutory definitions of 'modification' in the PSD and NSPS provisions to be interpreted identically"). Finding that Congress had in this way "'directly spoken to the precise question at issue,'" Pet. App. 11a n.3 (quoting *Chevron*), the court declared that "the language and various interpretations of the PSD regulations, on which the district court partially based its holding and which the parties exhaustively discuss, are largely irrelevant to the proper analysis of this case." *Id.*

In a footnote, the Fourth Circuit addressed its power to resolve the case on these grounds, stating that while Section 307(b) barred it from passing on the "validity" of the PSD regulations, the district court had shown that the regulations

"can be interpreted consistently with pre-existing principles – the NSPS regulations," and that "the statute" required the PSD rules to be so construed. Pet. App. 15a n.7.

4. Rehearing Petitions in *New York* and this Case. The D.C. Circuit's *New York* decision was handed down nine days after the decision in this case. In upholding the 1980 PSD regulations, the D.C. Circuit acknowledged the Fourth Circuit's decision, but held that the petitioners had waived the argument that EPA "must use identical regulatory definitions of modification across the NSPS and NSR programs." 413 F.3d at 20. The Utilities Air Regulatory Group (UARG), of which Duke is a member, and which was represented in *New York* by Duke's Fourth Circuit counsel, sought panel and en banc rehearing in *New York*, arguing that "[t]he statutory construction argument addressed and resolved by the Fourth Circuit in *Duke Energy* was the same one [UARG] presented in this case: the proper interpretation of CAA § 169(2)(C), the provision of the Act defining 'construction' for purposes of PSD." Pet. for Reh., D.C. Cir. No. 02-1387 at 13 (Aug. 8, 2005). The D.C. Circuit denied rehearing on December 9, 2005. 431 F.3d 801. No party petitioned for certiorari.

Petitioners and the United States sought rehearing in the Fourth Circuit, pointing both to the D.C. Circuit's ruling upholding the 1980 regulations and to its reading of the PSD provisions to *require* an actual emissions test for PSD. Those petitions were denied on August 30, 2005.[17] This Court granted certiorari on May 15, 2006.

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[17] EPA then issued a notice proposing to amend its regulations to establish, for Electric Generating Units, a "uniform emissions test nationally under the NSPS and NSR programs[.]" 70 Fed. Reg. 61081, 61083 (Oct. 20, 2005). While it "disagreed" with the *Duke* decision, and noted "differences" between NSPS and PSD precluding an identical modification test for both, EPA considered the need for changes "apparent" due to the Fourth Circuit's ruling. *Id.* at 61081, 61083 & n.3.

SUMMARY OF ARGUMENT

In deciding this case based on a statutory "mandate" that EPA use identical regulatory tests for NSPS and PSD modifications, the Fourth Circuit exceeded express statutory limits upon its authority. Section 307(b) of the Act, in the clearest possible terms, provides that review of national CAA regulations be obtained only in the D.C. Circuit, by petition for review filed within 60 days, and that matters reviewable in this manner "shall not" be subject to judicial review in enforcement proceedings such as this one.

The Fourth Circuit's decision is the paradigm of the broad, facial, nationally significant ruling that Congress assigned to the D.C. Circuit – exclusively. The court of appeals nowhere found, and in the circumstances *could not* have found, that the regulations promulgated in 1980 and 1992 lulled prospective litigants into believing that EPA had adopted PSD regulations identical to the NSPS regulations, or that EPA had adopted a "maximum hourly rate" test for PSD. The PSD rules on their face differ markedly from the NSPS rules in numerous significant respects, including their measurement of increases by "actual emissions" in "tons per year," and their provisions for "netting." EPA's 1980 preamble explained that these features of the rules represented a significant departure from the prior, potential emissions-focused test and had been tailored to the distinct requirements of the PSD program, as elucidated by the D.C. Circuit in *Alabama Power*. The *CMA* litigation and "Exhibit B" – which sought to strip the "actual" emissions language from the regulations and insert new hourly rate language – show that regulated parties understood that EPA had adopted a new, PSD-specific approach to determining modifications. Review of any statutory challenge like that sustained by the Fourth Circuit plainly "could have been obtained" in the D.C. Circuit, and was barred in this enforcement case. 42 U.S.C. 7607(b)(2), (d)(7)(B), (e).

The Fourth Circuit's insistence that it was merely engaged in "interpretation" of the 1980 PSD regulations – significantly

undercut by its statement that their language was "irrelevant," and its failure to examine the regulatory text or accompanying Federal Register preamble at all – rings hollow. Whatever room the PSD regulations may leave for interpretation on other points, on the point relevant here – whether their definition of modification mirrors the NSPS regulations, and imposes an hourly rate test – the regulations are unambiguous, and they cannot be so "interpreted."

The court of appeals' extrajurisdictional foray compromised the interests in regulatory stability, orderly administration, and uniformity that Section 307(b) was enacted to protect. The court held the PSD regulations defective on a ground that was not presented to EPA in its NSR rulemakings and that was waived in the Section 307(b) review proceeding in the D.C. Circuit. Its ruling conflicts with D.C. Circuit rulings on both the validity of specific PSD regulations and on the meaning of the statutory provisions that are pivotal to multiple major CAA programs.

Having ventured into territory prohibited to it by Section 307(b), the Fourth Circuit seriously misapprehended the substance of the Act. EPA's regulatory standard for PSD modifications adheres to the text of the statutory modification definition – which broadly embraces "any physical change" that "increases the amount of any air pollutant emitted" by a source – and to the D.C. Circuit's pathmarking construction of the PSD provisions in *Alabama Power*. As the D.C. Circuit has held, the Act unambiguously rules out an approach under which actual emissions increases resulting from a physical change are disregarded.

This Court's *Rowan* decision does not support the Fourth Circuit's reading of the Act. That case did not espouse the "effectively irrebuttable" presumption the court below took from it, but rested on a thoroughly conventional review of statutory text, purposes and history, which led to a conclusion that Congress had specifically intended the IRS to implement the particular statutes at issue through parallel regulatory standards. Here, there is no indication that Congress intended

or expected EPA to devise a uniform definition of "modification" without regard to the particulars of the different programs in which it must operate. This Court has directed that common statutory terms be read in context, and the Act's PSD provisions provide explicit support for EPA's definition of PSD emissions in terms of actual "tons per year." The D.C. Circuit, relying on the modification definition and other provisions of the PSD program, has held that EPA not only *may* but *must* measure PSD increases to capture *actual* increases in emissions, and must include in its PSD rules elements statutorily *forbidden* for NSPS.

The Fourth Circuit's mistaken conversion of the presumption of uniform usage into a peremptory iron law led it to impose on EPA a test for PSD modifications that would violate the PSD statute. By immunizing modernization projects that greatly "increase the amount" of pollution actually "emitted" by sources, the court's maximum hourly rate test would defeat the basic aim of the PSD enactment to assess and limit adverse impacts on local air quality.

ARGUMENT

I. SECTION 307(b) OF THE ACT PRECLUDED THE FOURTH CIRCUIT FROM REVIEWING THE STATUTORY VALIDITY OF EPA'S REGULATORY TEST FOR PSD MODIFICATIONS

The Fourth Circuit's theory that the PSD provisions' cross-reference to the Section 111(a)(4) definition of "modification" required that EPA's regulations on NSPS modifications and PSD modifications be identical involves precisely the kind of matter the Act reserves to the D.C. Circuit exclusively and that "shall not be" reached by a court in an enforcement action. 42 U.S.C. 7607(b)(2).

A. The Fourth Circuit Plainly Violated Section 307(b). Congress could not have been more explicit that statutory challenges to EPA regulations may be adjudicated exclusively in the D.C. Circuit on timely petition for review.

Section 307(b) provides that EPA regulations and other actions of national effect are reviewable "only" in that court, by petition filed within 60 days, and that actions reviewable by such a petition "shall not be subject to judicial review" in enforcement actions. See also 42 U.S.C. 7607(e). An exercise of Congress's recognized power to "prescribe the procedures and conditions under which, and the courts in which, judicial review of administrative orders may be had," the statute "is written in simple words of plain meaning and leaves no room to doubt the congressional purpose and intent." *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 335-36 (1958) (discussing Federal Power Act's review provision, 16 U.S.C. 825*l*(b)).[18] "[T]here is little room for doubt regarding congressional intent where, as here, the relevant statute speaks not only to the existence and nature of pre-enforcement review but also to the non-existence of enforcement-*cum*-review." *United States v. Ethyl Corp.*, 761 F.2d 1153, 1157 (5th Cir. 1985). In short, Section 307(b) means "exactly what it says." *Harrison*, 446 U.S. at 589.

Section 307 reflects Congress's considered – and reconsidered – judgment that limitations on the timing, scope, and forum for judicial review are of central importance to the implementation of this uncommonly complex statute. See *Alabama Power*, 606 F.2d at 1075. In 1977, after reviewing proposals to narrow Section 307's limitations, Congress instead expanded the grant of exclusive jurisdiction (while also enlarging the time for review and adding detailed requirements for EPA rulemaking). See *supra*, p. 8 & n.3. Congress deliberately called upon the D.C. Circuit's special expertise in superintending the administration of complex

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[18] See *F.C.C. v. ITT World Commc'ns, Inc.*, 466 U.S. 463, 468 (1984) (discussing exclusive D.C. Circuit review of certain FCC orders, see 47 U.S.C. 402(a)); *E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 136-137 (1977) (discussing Section 509(b) of Clean Water Act, 33 U.S.C. 1369(b)); *NLRB v. Cheney Cal. Lumber Co.*, 327 U.S. 385, 388 (1946).

regulatory statutes,[19] and promoted stability and uniformity by giving that court's decisions a definitive role in overseeing CAA implementation. See *City of Tacoma*, 357 U.S. at 336 (referring to "statutory finality" created by Federal Power Act's exclusive review provision); *Lubrizol Corp. v. Train*, 547 F.2d 310, 317 (6th Cir. 1975) (in Section 307(b), "Congress established a single, national forum whose decisions would be uniform and final, save for review by the Supreme Court"). Implementing the Act is an iterative process, in which both the D.C. Circuit and the EPA must construe the Act in light of D.C. Circuit precedent, subject to this Court's review. See *Dayton Power & Light Co. v. EPA*, 520 F.2d 703, 708 (6th Cir. 1975) (EPA regulations were "promulgated in response to" ruling of D.C. Circuit, which was "[c]learly * * * in the best position to determine whether the regulations are consistent with its order").[20] Section

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[19] See, *e.g.*, Henry J. Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267, 1310 (1975) (noting D.C. Circuit's "special importance for administrative law" in light of CAA's and other exclusive review provisions); *O'Donoghue v. United States*, 289 U.S. 516, 535 (1933) (The "courts of the District" are "in closer contact with, and more immediately open to the influences of, the legislative department, and exercise a more extensive jurisdiction in cases affecting the operations of the general government and its various departments" than other federal courts). In opposing the 1976 Administrative Conference proposal, later rejected by Congress, to limit the scope of exclusive review, EPA General Counsel G. William Frick emphasized the D.C. Circuit's "obvious expertise in administrative law matters," its "sensitivity to Congressional mandates," and its "thorough[] familiar[ity]" with the CAA, a "very complex statute – and with its equally complex legislative history." 41 Fed. Reg. at 56769. See *Citizens to Save Spencer County v. EPA*, 600 F.2d 844, 859 (D.C. Cir. 1979) (reviewing, pursuant to Section 307, challenges of "baroque complexity" to "highly complex" PSD rules promulgated by EPA "besieged on all side by vocal private and public interest groups").

[20] Because agencies must adhere to precedent grounded on unambiguous statutory commands, *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2700 (2005); *Chevron*, 467 U.S. at 843 n.9, Section 307(b) protects EPA from the quandary presented (as here) by conflicting judicial readings of those commands.

307(b) ensures that a court reviewing complex decisions of national significance will have before it the rulemaking record upon which to evaluate the agency's actions. See 42 U.S.C. 7607(d)(7)(A) (defining "record for judicial review"); *Lubrizol Corp.*, 547 F.2d at 316; cf. *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744-45 (1985) (discussing reasons for initial court of appeals review under Hobbs Act).

By barring other courts from deciding matters that "could have been" resolved in the D.C. Circuit, the Act gives parties of all stripes reason to present their inevitably conflicting theories about the Act's meaning in the same time and place. And by barring review of such matters in enforcement actions, the Act expresses Congress's strong preference that regulations restricting the emission of harmful pollutants into the air should be followed – or promptly challenged – but not disobeyed in hopes that the local court in which enforcement proceeds will invalidate them. See S. Rep. No. 91-1196 at 38 (the issue before courts in public or citizen enforcement actions is the "factual one of whether there had been compliance"); *Hawaiian Elec. Co. v. EPA*, 723 F.2d 1440, 1447 (9th Cir. 1984) (challenge to 1980 PSD modification regulations barred by Section 307(b), a "valid mechanism to prevent continual piecemeal attacks on the same EPA action"); see also *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 323 n.2 (1982) (discussing Clean Water Act enforcement). The effect of a D.C. Circuit ruling that CAA regulations are flawed is a remand to EPA, see *Florida Power & Light Co.*, 470 U.S. at 744, rather than, as here, a disruptive intercircuit conflict over the validity of *national* regulations and over the meaning of the Act.

Section 307's multiple prohibitions against entertaining in other fora challenges that could have been brought by petition in the D.C. Circuit squarely applied here. Any claim that the "plain language of the Clean Air Act" mandated that EPA adopt "identical[]" modification regulations for the NSPS and the NSR programs (Pet. App. 14a), was a "facial" challenge to the regulations, a pure question of law that fell in the very

heartland of the D.C. Circuit's exclusive review authority. See *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 479 (2001) (pointing to the "special judicial-review provision of the CAA, 42 U.S.C. § 7607(b)" in holding that Court, reviewing a D.C. Circuit decision, could address issue that was "purely one of statutory interpretation"). Nothing about the Fourth Circuit's abstract statutory theory depended on EPA's *application* of its regulations to particular circumstances. Cf. *Puerto Rican Cement*, 889 F.2d at 296-98. EPA's adoption in 1980 – as in *all* generations of its PSD and NNSR regulations – of a test for modifications that differs in explicit and decisive ways from the agency's NSPS modification test constituted "[a]ction of the Administrator with respect to which review could have been obtained under paragraph (1)" of Section 307(b), 42 U.S.C. 7607(b)(2).[21]

Nor could anyone have believed, in 1980, that EPA had established PSD regulations that were identical to its NSPS regulations. The marked difference between the modification tests – "hourly rate" for NSPS and "actual, annual" for NSR – has been a staple of judicial and academic descriptions of the NSPS and PSD regulatory regimes.[22] The PSD regulations'

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[21] See H.R. Rep. No. 95-294 at 322 ("[U]nless a petitioner can show that the basis for his challenge did not exist or was not reasonably to be anticipated before the expiration of 60 days, the court of appeals is without jurisdiction to consider a petition filed later than 60 days after the publication of the promulgated rule.").

[22] See *New York I*, 413 F.3d at 18 ("While the NSPS regulatory definition of modification allegedly focuses on the hourly rate of emissions, the NSR definition focuses on net emissions increases measured in tons per year"); *WEPCo*, 893 F.2d at 913, 915 (contrasting NSPS and PSD regulations); *United States v. Ohio Edison Co.*, 276 F. Supp. 2d 829, 875 (S.D. Ohio 2003) (rejecting claim that PSD regulation provides for "hourly emissions rate test" and finding it "abundantly clear" that it "focuses on ... total annual emissions" whereas NSPS regulation "focuses on the maximum potential hourly emissions"); *United States v. S. Ind. Gas & Elec. Co.*, 245 F. Supp. 2d 994, 998 (S.D. Ind. 2003). See also 57 Fed. Reg. at 32316 ("Emissions increases for NSPS purposes are determined by changes in the hourly emissions rates at maximum physical capacity," whereas "the

"actual emissions" metric and their references to "tons per year," 40 C.F.R. 51.166(b)(1)(i)(a), (21)(ii), (23)(i), nowhere appear in the NSPS regulations, which measure emissions increases by changes in hourly rates, in "kg/hr." *Id.* 60.14(b). The 1980 PSD regulations specifically require that a source's pre-change emissions be "calculated using the unit's actual operating hours," 40 C.F.R. 51.166(b)(21)(ii), while the NSPS regulations contain no such provision. The NSPS regulations contain elaborate procedures, absent from the PSD regulations, for calculating hourly emission rates. 40 C.F.R. 60.14(b) (1), (2) (discussing emissions factors, material balances and testing procedures). See also 40 Fed. Reg. at 58420 (Appendix C). The equally elaborate netting provisions in the PSD regulations, *e.g.*, *id.* 51.166(b)(3) – linked to the statute's distinctive focus on large sources' effects on local air quality, see *Alabama Power*, 636 F.2d at 401 – are absent from the NSPS regulations, as are the PSD "significance" thresholds, measured in "tons per year." 40 C.F.R. 51.166(b)(23)(i). These and other differences provided vivid notice to prospective litigants that EPA, in 1980, did not espouse the view that its PSD and NSPS modification regulations had to be, or were, the same. The only avenue for a claim that EPA had thereby violated "the plain language of the Clean Air Act," Pet. App. 14a, was a petition for review in the D.C. Circuit.

The 1980 preamble provided equally vivid notice. Highlighting the significance of its new emissions increase test for PSD, EPA announced that it had "shifted the focus of its regulatory definitions from 'potential to emit' to 'actual emissions.'" 45 Fed. Reg. at 52700; see *New York*, 413 F.3d at 14 (discussing this shift). Explaining this departure from

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NSR regulations examine total emissions to the atmosphere * * * determined by changes in annual emissions as expressed in tons per year (tpy)."); Arnold W. Reitze, Jr., STATIONARY SOURCE AIR POLLUTION LAW 170 (2005)) ("Unlike NSPS, which are based on a change in the hourly rate of emissions, PSD applicability is triggered by significant changes in total annual emissions, expressed in tpy.").

the 1979 proposed regulations, under which PSD would have been triggered by increases in "a unit's potential to emit the pollutant," 44 Fed. Reg. at 51948, EPA pointed to *Alabama Power*'s mandate to address "actual" impacts on air quality. 45 Fed. Reg. at 52700. EPA also explained that the shift to an actual emissions test was also necessary to prevent malfunction and misuse of the netting mechanism. *Id.*; see also *id.* at 52713 (increased emissions "due to increased hours of operation or capacity utilization" occurring after the baseline period count against increment).

That EPA had adopted a new modification standard specially tailored to the PSD provisions was not lost on the agency's readership. The General Motors petitioners in *CMA* complained vociferously that under the new regulations PSD would apply to projects that "result in a significant increase in *actual* emissions, even though the source's net *capacity* to emit remains constant or declines." Br. at 5-6 (D.C. Cir. No. 79-1112) (emphasis in original). And Exhibit B to the *CMA* settlement proposed to "delet[e]" the word "actual" from the 1980 regulations, and to substitute a test that would have exempted all physical changes from PSD review in the absence of a net increase in "PTE [potential to emit] (as calculated in terms of pounds of pollutant emitted per hour)." 67 Fed. Reg. at 80205 (quoting Exhibit B).[23]

B. The Fourth Circuit's "Interpretation" of the 1980 PSD Regulations Contravened Section 307(b) and Is Foreclosed By the Regulatory Text.

In response to objections that EPA's regulations were subject to exclusive review in the D.C. Circuit, the Fourth Circuit stated it was merely addressing an "interpretation" of EPA's 1980 PSD regulations, which in its view could be "interpreted consistently with pre-existing principles," namely

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[23] The considerations just summarized utterly banish from this case the kind of fair notice concerns that might be raised by some applications of Section 307(b)(2). See *Adamo Wrecking*, 434 U.S. at 283 n.2.

"the NSPS regulations." Pet. App. 15a n.7.[24] The court of appeals did not itself explain how such an interpretation could be accomplished, instead pointing to the district court's opinion, and insisting that a "choice of this interpretation – as required under the statute – over the EPA's interpretation is not an invalidation of those regulations." *Id.*[25]

But the Fourth Circuit's own opinion makes plain that the court strayed far into forbidden D.C. Circuit terrain. Indeed, the court confided that, *because* its ruling was based upon the statute under the first prong of *Chevron*, "the language and various interpretations of the PSD regulations" were "largely irrelevant to the proper analysis of this case." Pet. App. 11a n.3. The court went on wholly to ignore the central tools for

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[24] No genuine question is presented here of Section 307(b)(2)'s effect on the authority of courts in enforcement actions to review agencies' interpretations of their own regulations, since the Fourth Circuit's ruling was by any measure a clearly forbidden, facial, *statutory* invalidation of national CAA regulations. By its terms, Section 307(b)(2) does not turn on "invalidation" versus "interpretation" of regulations, but instead on whether judicial review "could have been obtained" under Section 307(b)(1), which authorizes review of some agency interpretations of their own regulations. See *Harrison*, 446 U.S. at 586-94 (Section 307(b)(1) provides for court of appeals review of NSPS applicability determination); *Puerto Rican Cement*, 889 F.2d at 296-98, 299 (reviewing EPA's application of PSD regulations to the petitioner's facility).

[25] There was an odd mismatch between the court of appeals' reading of what "the statute" required – identity between NSPS and PSD modification regulations mandated by the common statutory definitions – and its rather casual endorsement of *the district court*'s analysis, which had relied on provisions of the PSD regulations, relating to netting and "significance" thresholds, (Pet. App. 64a-65a & n.22) that are entirely absent from the NSPS regulations *and thereby violate the Fourth Circuit's reading of the CAA's "mandate."* See also *id.* at 64a (district court's insistence that its interpretation did *not* make the PSD and NSPS tests "indistinguishable"). The Fourth Circuit left unexplained, as well, how the 1992 amendment to the PSD regulations test for emissions increases, unaddressed by the district court and unchallenged by Duke or any other utility despite its patent difference from the NSPS increase test, *New York*, 413 F.3d at 17, could be "interpreted" to conform its statutory theory.

interpreting regulations, such as the regulatory text, *Christensen v. Harris County*, 529 U.S. 576, 587-88 (2000), and the rulemaking preamble. Even when regulatory text permits alternative readings, a court has no warrant to overturn an agency's interpretation merely because the court concludes the text "can be interpreted" differently.[26] A species of "interpretation" that deems regulatory language and the agency's contemporaneous Federal Register explanation "irrelevant" would, among other defects, nullify the explicit restrictions imposed by Congress in Section 307(b), and open the door to all manner of congressionally prohibited collateral attacks. The Fourth Circuit's *actions* consisted of a statutory invalidation of national EPA rules, a paradigmatic violation of Section 307(b) and (e).

In any event, the court was entirely wrong in concluding that the PSD modification regulations "can be interpreted" to be identical to, or the functional equivalent of, the NSPS regulations. As we have just explained, the PSD regulations nowhere provide for, and cannot accommodate, the maximum hourly rate test imposed by the courts below. They were deliberately crafted to capture net increases in "actual emissions," measured in "tons per year," whether or not there is an increase in maximum hourly emissions rates or other measure of capacity to emit, and the two sets of regulations differ in numerous other obvious and fundamental ways. Section 307(b) barred the Fourth Circuit from doing what Duke and the other *CMA* challengers unsuccessfully tried to do: "delete" the PSD regulations' reliance on "actual" emissions, and amend the regulation to add a "potential to emit" test under which no PSD "modification" could be found absent an increase in hourly emissions rates. *Supra*, p. 12-13.

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[26] An agency's interpretation merits "substantial deference," *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994), and "control[s]" unless "'plainly erroneous or inconsistent with the regulation.'" *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citations omitted). See *Puerto Rican Cement*, 889 F.2d at 297.

The basis for the Fourth Circuit's alternative "interpretation" of the PSD regulations was the district court's opinion, which relied (Pet. App. 59a-60a) on the provision stating that "[a] physical change or change in the method of operation shall not include" an "increase in the hours of operation or in the production rate * * *" 40 C.F.R. 51.166(b)(2)(iii)(*f*).[27] The court understood this provision to mean that even when a plant undergoes an extensive physical change – a "modernization" – the very purpose of which is to allow it to operate dramatically more hours, regulators must *pretend* that hours of operation and production rates will remain unchanged. See Pet. App. 58a-59a ("in calculating post project emissions levels the hours and conditions of operation must be held constant").[28]

This reading is manifestly wrong. By providing that an

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[27] The court of appeals (Pet. App. 15a n.7) also cited statements by Edward Reich, Director of EPA's Division of Stationary Source Enforcement, in which Reich stated that increased hours of operation would not suffice to trigger PSD. JA 28, 35. Reich's statements on the increased hours exemption do not address situations where a physical change enables increased hours of operation, and, to the extent they are construed to exempt the resulting emissions from the definition of emissions "increase" (rather than "change"), are flatly inconsistent with the text of and preamble to the 1980 regulations, and with EPA's application of them since Reich's statements, see, *e.g.*, JA 294; 57 Fed. Reg. at 32328. In *Puerto Rican Cement*, the court properly rejected a similar reliance on the "deviant" reading of the PSD regulations in by an EPA official, observing that the statements were inconsistent with "EPA materials written both before, and after," and that "[n]o large agency can guarantee that all its administrators will react similarly, or interpret regulations identically, throughout the United States." 889 F.2d at 298-99.

[28] The district court claimed to fit an hourly rate test into the PSD rules by "annualizing" it (*e.g.*, Pet. App. 64a), a step the court considered necessary to conform to the regulations' numerous references to annual emissions. The regulations, however, make no mention of annualization of hourly rates, and the "net emissions increase" definition encompasses annual emissions precisely *because* it references "actual emissions," which are defined by "tons per year" of emissions. 40 C.F.R. 51.166(b)(3)(i), (b)(21).

increase in hours or production rates does not constitute a "*physical change or change in the method of operation,*" what the regulations plainly mean is that a modification will not be found in the absence of a physical change. The fact that an increase in operating hours does not alone suffice to meet the *first* prong of the two-part modification test in no way suggests that increases in actual emissions caused by a physical change should be ignored. See *Ohio Edison*, 276 F. Supp. 2d at 876 (exemption "clearly" limited to "an increase in hours of operation unaccompanied by physical construction to the unit itself"). The question of what counts as an increase is addressed by the *second* prong of the modification test, defining a "significant emissions increase," which, far from ignoring hours or production rates, requires consideration of both. 40 C.F.R. 51.166(b)(21)(ii).

Properly understood, the regulations ensure that prosaic business decisions that might appear to fall within the statute's broad references to "any physical change" or "any * * * change in the method of operation" do not trigger PSD requirements. As EPA explained in 1980, the exemption derived from the agency's decision that the regulatory definition of modification "should focus on changes in 'actual emissions,'" and that:

> While EPA has concluded that as a general rule Congress intended any significant net increase in such emissions to undergo PSD or nonattainment review, it is also convinced that Congress could not have intended a company to have to get an NSR permit before it could lawfully change hours or rate of operation. Plainly, such a requirement would severely and unduly hamper the ability of any company to take advantage of favorable market conditions. The emphasis of the relevant statutory provisions on 'construction' strongly supports EPA's interpretation of Congress' intent. See, *e.g.*, section 165(a), 42 U.S.C. 7475.

45 Fed. Reg. at 52704. EPA's rationale, like the regulatory text, demonstrates that the exemption was not meant as an

instruction to engage in the counterfactual exercise in measurement engaged in by the district court.

Because "modification" is a dual test under the statute – requiring a "physical change" and an "increase" in the amount of pollutant emitted by a source – the PSD regulations broadly allow a facility to increase its hours of operation or production rates in response to business needs without triggering PSD. But, under PSD, if a dilapidated source is physically rebuilt to expand operations, the additional pollution that results from the expanded use of the facility is considered in determining whether PSD applies, because both of the statutory criteria are satisfied. See 57 Fed. Reg. at 32328 ("[A]n increase in emissions attributable to an increase in hours of operation or production rate which is the result of a construction-related activity is not excluded from [PSD and NNSR] review.") (citing *WEPCo*, 893 F.2d at 916 n.11, and *Puerto Rican Cement*, 889 F.2d at 298).

C. The Ruling Below Produced the Very Disarray Section 307(b) was Enacted to Prevent.

The Fourth Circuit's ruling struck a serious and wholly gratuitous blow to a complex body of case law and agency regulations that emerged from 25 years of rulemaking and judicial review under CAA Section 307(b) and (d). The EPA regulations the Fourth Circuit found wanting were themselves enacted in large part to conform to a D.C. Circuit decision (*Alabama Power*) that had construed the PSD provisions of the Act not only to permit but to *require* a distinctive regulatory test for modification – a test that reflects statutory imperatives peculiar to the NSR programs and that make it fundamentally different from the NSPS regime. Without the benefit of the administrative record on which Congress commanded that EPA's national policy decisions be reviewed, 42 U.S.C. 7607(d)(2)-(7), the court struck down EPA's regulatory test on statutory grounds that had not even been presented to the agency in any of the various PSD rulemakings, *id.* 7607(d)(7)(B), or presented to the D.C.

Circuit in the *CMA/New York* proceeding.

The Fourth Circuit's broad statutory ruling produced just the sort of "inconsistent adjudications," *Ethyl Corp.*, 761 F.2d at 1156, Section 307(b) was enacted to prevent, and its decision was at odds with decisions of the very court Congress assigned exclusive authority to make determinations of this kind. *Alabama Power* and *New York* are utterly inconsistent with the "mandate" the Fourth Circuit discerned from the Act. See also *New York v. EPA*, 443 F.3d 880, 889 (D.C. Cir. 2006) (*New York II*) (in Section 307(b) challenge to 2003 NSR rules, stating that "[t]o the extent industry intervenors [including Duke] rely on the NSPS regime to reargue their position that 'modifications' require an increase in maximum emissions rates, that issue was resolved in *New York I*, 413 F.3d at 19-20, 40"). If other courts can be persuaded (as they are being importuned) to brush aside Section 307(b), the Fourth Circuit's ruling will continue to invite collateral attacks on every generation of EPA's PSD and NNSR modification regulations (all of which differ in important ways from the agency's NSPS regulations). When it enacted and expanded Section 307(b), Congress sought to ward off just that result, recognizing that regulatory stability and national uniformity are particularly important in the CAA context, not least for States that incorporate regulations in their SIPs. See *Train v. Natural Resources Def. Council*, 421 U.S. 60, 87 (1975) (noting States' "reliance" on EPA's CAA implementing regulations).

II. EPA'S DEFINITION OF PSD MODIFICATIONS BY REFERENCE TO INCREASES IN ACTUAL, ANNUAL EMISSIONS IS CONSISTENT WITH THE ACT

The Fourth Circuit's ruling would warrant reversal even if there were no Section 307(b). EPA's decision to assess PSD "modifications" in terms of physical changes' net effect on a source's *actual*, *annual* emissions is entirely consistent with the Act and reasonable. The court below condemned it only by erroneous reliance on an exceptionally rigid presumption

that is unsupported by this Court's decisions. The court thereby imposed a test for PSD modifications that is itself contrary to the plain text and basic purposes of the statute – and to the decisions of the court of appeals with express authority to determine the validity of CAA regulations.

A. The Statutory Text Supports EPA's Approach.

An agency's construction of a statute it administers must be upheld if it is consistent with the "unambiguously expressed intent of Congress," and – to the extent the statute is ambiguous – "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 842-43. See 42 U.S.C. 7607(d)(9) (statutory standard of review of CAA regulations, including PSD regulations, *id.*, 7607(d)(1)(J)).

The plain language of the Act strongly supports the agency's approach. In promulgating the 1980 rules, EPA properly emphasized that plain text: "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emissions of any air pollutant not previously emitted" – observing that "the underlined words in the definition appear to refer to what the source is actually emitting at a particular time." 45 Fed. Reg. at 52700 (quoting 42 U.S.C. 7411(a), underlining added by EPA). EPA noted that *Alabama Power* had described the PSD provisions in terms that "like the section 111(a)(4) definition, suggest changes in actual emissions," and that the agency's regulatory definition was "consistent with the [D.C. Circuit's] view of section 111(a)(4)." *Id.* (citing 636 F.2d at 400-01).

EPA's definition of PSD modifications in terms of actual emissions is supported by statutory language defining "major emitting facilit[ies]" subject to PSD as sources "which *emit, or which have the potential to emit*," pollutants in specified annual amounts. 42 U.S.C. 7479(1) (emphasis added). This "juxtaposition * * * indicates that when Congress enacted the NSR program in 1977, it was conscious of the distinction

between actual and potential emissions." *New York*, 413 F.3d at 39 (citing *Alabama Power*, 636 F.2d at 353, which, based on this same text, concluded that "[p]lainly, the pollutants that sources 'emit' is a reference to some measure of actual emissions"). "If Congress had intended for 'increases' in emissions to be measured in terms of potential or allowable emissions, it would have added a reference to 'potential to emit' or 'emission limitations.'" *New York*, 413 F.3d at 40. Thus, "the plain language of the CAA indicates that Congress intended to apply NSR to changes that increase actual emissions instead of potential or allowable emissions." *Id.* [29]

EPA's decision to measure emissions increases in annual terms – in "tons per year" – is also firmly rooted in the text, which measures emissions for PSD coverage and exemption purposes in "tons per year." 42 U.S.C. 7475(b), 7479(1). See also *id.* 7602(j), (x) (NNSR source definition in terms of "tons per year" of emissions). In the 1990 amendments, Congress continued the NSR programs' reliance on actual, annual emissions. Congress enacted rigorous new NNSR thresholds based on actual annual emissions of pollutants, calibrated to the severity of the given area's pollution levels. See, *e.g.*, 42 U.S.C. 7511a(c) (major source thresholds for serious ozone areas of "50 tons per year"); 7511a(d) (for severe areas, "25 tons per year"); 7511a(e) (for extreme area, "10 tons per year"). The NSR provisions, in short, are plainly "concerned with increases in *total annual emissions*." *WEPCo*, 893 F.2d at 904 (emphasis added).

The PSD program protects local air quality largely through the increment mechanism (wholly absent from NSPS), and the "emphatic goal of the PSD provisions is to prevent those thresholds from being exceeded[.]" *Alabama Power*, 636 F.2d at 362. Increments are set by reference to a "baseline

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[29] See also 42 U.S.C. 7475(b) (exempting "an *expansion or* modification of a major emitting facility which is in existence on August 7, 1977" with "less than fifty tons per year" of "*allowable*" emissions from certain PSD obligations) (emphasis added); *Alabama Power*, 636 F.2d at 400 n.47.

concentration," 42 U.S.C. 7473, 7479(4), which "include[s] all emissions *actually being made* by major facilities." *Alabama Power*, 636 F.2d at 376 (emphasis added). EPA's definition of "significant net emissions increase" was meant to "establish as close a correspondence as possible" between PSD permitting requirements and activities that in fact "consumed increment." 45 Fed. Reg. at 52701. See also *id.* at 52721 ("both baseline concentrations and increment consumption should be based on actual air quality impacts"); *id.* at 52714 (increased pollution from existing sources not "grandfather[ed]" into baseline, but instead counted against increment). This choice was surely reasonable, if not statutorily mandated: Under the PSD statute, "all emissions are considered" in calculating increment consumption, *Alabama Power,* 636 F.2d at 381 (citing H.R. Rep. No. 95-564 at 151 (1977).[30] Exempting changes that significantly increase actual, annual emissions would frustrate States' ability to track and allocate increment in ways that reflect their policy choices regarding new development. See S. Rep. No. 95-127, pt. 98 at 31 (1977).[31]

Moreover, EPA's focus on actual emissions ensures that netting credits are conferred only for contemporaneous "decreases" in emissions that produce real air quality benefits. A test turning on capacity to emit would convert netting, designed to provide flexibility for projects whose overall effect is benign, into a program of exemptions for projects that in fact harm air quality. See 45 Fed. Reg. at 52700; 61 Fed. Reg. at 38269. That result would be especially perverse given that *Alabama Power* held netting to be statutorily

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[30] As explained in *Alabama Power*, Congress *rejected* proposals to make the baseline turn on "plant capacity in existence." See 636 F.2d at 380-81.

[31] A test exempting such projects from PSD review and BACT controls would allow "modernized" projects to consume increment otherwise available to other sources, see 45 Fed. Reg. at 52720, potentially barring a "major new source with state-of-the-art emissions controls" from locating in the area. 61 Fed. Reg. at 38270.

required for PSD, even though statutorily prohibited for NSPS, see *ASARCO*, 578 F.2d at 327-29, precisely *because* of the PSD provisions' distinctive focus on projects' actual effects on local air quality. 636 F.2d at 401.

EPA's use of actual emissions has the virtue of "coherence" and "consistency with" the PSD provisions' "primary purpose." See *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997). That purpose is reflected both in broad statutory aspirations, 42 U.S.C. 7470, and in the elaborate mechanics of the program. On every page, the statutory text confirms what *Alabama Power* emphasized: The PSD program is focused on assessing and limiting actual "effects" and "impacts" on air quality in the vicinity of the source.[32]

B. Congress's Use of the Same Statutory Definition of "Modification" for NSPS and the NSR Programs Provided No Basis to Invalidate the PSD Rules.

The Fourth Circuit found EPA's PSD regulations contrary to the Act only by using a decidedly *non*traditional "tool[] of statutory construction," *Chevron*, 467 U.S. at 843 n.11, *i.e.*, what it called an "effectively irrebuttable" presumption derived from *Rowan*. Pet. App. 17a. This conclusion was seriously misguided in multiple respects.

Rowan itself does not announce, or employ, any such rigid presumption. In that case, the Court considered the meaning

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[32] See, *e.g.*, 42 U.S.C. 7470(5) (requiring "careful evaluation" of any decision "to permit increased air pollution in any area"); 7472(a) & 7475(d) (heightened protection for specified Parks and wilderness areas); 7473 (increments); 7475(a)(2) (requiring hearing on "air quality impact of such source"); 7475(a)(6) (requiring analysis of "any air quality impacts projected for the area as a result of growth associated with such a facility"); 7475(a)(7) (requiring monitoring "to determine the effect which emissions from any such facility may have" on "air quality in any area which may be affected"); 7475(e)(1) (pre-permitting analysis of "ambient air quality at the proposed site"); 7475(e)(3)(B) (detailing requirements to assess "the effect of emissions from a proposed facility"); 7479(3) ("case-by-case," source-specific BACT requirement, "taking into account energy, environmental, and economic impacts").

of the statutory term "wages" as used in federal revenue laws. The relevant statutes set forth three definitions of that term – identical definitions governing contributions to the Social Security (FICA) and unemployment insurance (FUTA) programs, and a similar definition in the income-tax withholding statute. See 452 U.S. at 249 & n.2. Treasury regulations provided that employees' meals and lodging furnished for the "convenience of the employer" were not "wages" for purposes of the withholding statute, but were "wages" under FICA and FUTA. The Court described the question before it as whether the latter regulatory definitions were consistent with the agency's obligation to "'implement the congressional mandate in some reasonable manner,'" 452 U.S. at 252 (citation omitted), adding that the regulations were due "less deference" because promulgated under only a general grant of rulemaking authority, *id.* at 253.

The Court found in the history of the three statutes "strong evidence that Congress intended 'wages' to mean the same thing under FICA, FUTA, and income tax withholding." 452 U.S. at 255. That history revealed "congressional concern for 'the interest of simplicity and ease of administration,'" *id.* at 255-56 (quoting S. Rep. No. 77-1631 at 165 (1942)), and an intent "to coordinate the income-tax withholding system with FICA and FUTA." *Id.* at 257. "[O]ne of the means Congress chose" to pursue that end was "to base withholding upon the same measure – 'wages' – as taxation under FICA and FUTA," a term with a meaning known to be "'intentionally narrow and precise.'" 452 U.S. at 255-56 (quoting *Central Illinois Pub. Serv. Co. v. United States*, 435 U.S. 21, 31 (1978)). See also 452 U.S. at 254 (noting agency's "acknowledgment" that benefits at issue were not "income," and that *Central Illinois* had held "wages" to be a "narrower concept" than "income"). The Court found it "extraordinary" that "a Congress pursuing this interest" would have intended, "without ever saying so, for identical definitions to be interpreted differently." *Id.* at 257. It noted, as well, that the IRS had first adopted parallel regulations, only to later change

the FICA/FUTA rules "without explanation." *Id.* at 259, 260.

Rowan itself never endorsed the extremely strong and general "presumption" the court of appeals took from it. In reaching its decision in that case, the Court analyzed the text and history of the relevant statutes and its own prior construction of the term "wages," found indications that Congress had intended the agency to adopt identical definition of "wages," and highlighted Treasury's wholesale failure to explain its decisions. Nothing in *Rowan* suggests that an inference created by Congress's use of identical or similar definitions is *ever* "irrebuttable" (Pet. App. 17a) by reference to the particular statutory contexts in which the terms are used. Nor has this Court ever cited *Rowan* as establishing any such overbearing canon of construction. In the 25 years since *Rowan* was decided, this Court has cited it only once, in *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 24 (1982), decided the same Term, and there only for the proposition that Treasury regulations promulgated under general rulemaking authority receive less than full deference.

This Court's precedent, in fact, strongly refutes the Fourth Circuit's acontextual canon. The presumption of uniform usage "'is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent.'" *General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 595 (2004) (citations omitted). Far from establishing any irrebuttable presumption, this Court has always "recognize[ed] the controlling significance of context," *Wachovia Bank, Nat'l Assoc. v. Schmidt*, 126 S. Ct. 941, 948-49 (2006), in construing common statutory terms.[33]

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[33] See, *e.g.*, *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001); *Concrete Pipe & Products of Cal., Inc. v. Constr. Lab. Pension Trust for S. Cal.*, 508 U.S. 602, 634 (1993); *Erlenbaugh v. United States*, 409 U.S. 239, 245 (1972); *Lee v. Madigan*, 358 U.S. 228, 231 (1959); *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 86-87 (1934). Walter Wheeler Cook's comparison of an over-rigid presumption

And contrary to the Fourth Circuit's view, the fact that terms here are found in the form of a shared statutory *definition* does not deactivate that "controlling" principle. Thus, in *Robinson v. Shell Oil Co.*, 519 U.S. 337, 343 (1997), this Court unanimously held that the term "employee" in Title VII, a term governed by a *single* definition covering that *entire* statute, 42 U.S.C. 2000e(f), includes former employees in some parts of the statute but not in others, depending upon the "context" of the particular use. 519 U.S. at 343-44. See *id.* at 343 (noting that term "may have a plain meaning in the context of a particular section," but not have "the same meaning in all other sections and in all other contexts"). See also *Chevron*, 467 U.S. at 842, 845 (court of appeals erred by imposing "static judicial definition" of term "source" as used in NNSR, stripping EPA of ability to interpret term in a way that made sense "in the context of this particular program"). The Court in *Robinson* concluded that construing "employee" to include former employees was warranted in the context of Title VII's retaliation provisions, a construction "consisten[t] with a primary purpose" of those provisions to maintain access to statutory remedies. 519 U.S. at 346. Compare Pet. App. 18a (Fourth Circuit's conclusion that common definition of "modification" created "mandate" that "the different purposes of the NSPS and PSD programs cannot override").

In contrast to *Rowan*, there is every indication that Congress did *not* mean to require EPA to adopt identical regulatory definitions of "modification," and component terms like emissions "increase," for the distinct, technical, and complex NSPS, PSD, and NNSR programs.[34] EPA must,

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of uniform usage to "'original sin'" has "become a staple of [this Court's] opinions." *General Dynamics Land Sys.*, 540 U.S. at 596 n.8 (citations omitted). See also *Nat'l Mining Ass'n*, 59 F.3d at 1358 (upholding EPA's differing interpretation, in Section 307(d) CAA rulemaking, of "very similar" definitions of major source, and noting that "[d]ifferent [CAA] programs have different objectives and structure").

[34] Nor, as the D.C. Circuit explained, is there is any evidence Congress intended to import any specific NSPS regulation as a statutory

under each program, give effect to the two-step concept of "modification" set forth in 42 U.S.C. 7411(a)(4) – requiring a "physical [or operational] change" that "increases the amount of any air pollutant emitted." (And there is surely no inconsistency between the PSD regulations and that statutory language). By fitting the general definition to the particulars of the respective programs, EPA has properly interpreted the constituents of the definition, including "increase" and "amount emitted" – themselves undefined by Congress – to effectuate differences in coverage, operation, and purpose between NSPS, enacted in 1970, and the two NSR programs enacted seven years later. NSPS and NSR differ fundamentally, and EPA was surely not precluded from taking account of their differences in crafting its respective modification regulations.

NSPS sets identical operational requirements for new and modified sources within a source category, without regard to site-specific factors, and with no threshold based on source size or emissions levels. Congress adopted an entirely different approach in the 1977 amendments.[35] PSD is pervasively concerned with protecting local air quality, a purpose that necessitates, as *Alabama Power* explains, a focus on actual pollution "amounts" – as well as netting to allow sources to make physical changes without PSD review when their overall effect will be to leave air quality in the vicinity unharmed. See *Northern Plains Resource Council v. EPA*, 645 F.2d 1349, 1356 (9th Cir. 1981) (contrasting "equipment oriented" NSPS with "site oriented" PSD program). Instead of generic, national technology-based standards, the PSD provisions require modeling of local pollutant levels, specific

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requirement for PSD. See *New York*, 413 F.3d at 18-20; cf. 42 U.S.C. 7478(b) (*expressly* providing for certain projects commenced before 1977 amendments' effective date to be governed by 1974 PSD regulations).

[35] Recognizing the relevant similarities between the two NSR programs, EPA has chosen to adopt NNSR modification regulations "largely identical" to its PSD regulations. See 57 Fed. Reg. at 32316 n.7.

determinations of the probable impacts of the proposed project's emissions on local air quality, and pollution controls imposed in a "case-by-case" manner.

The word "source" in the common modification definition has a different referent under PSD than under NSPS. Compare 42 U.S.C. 7411(a)(3) (NSPS "stationary source") with *id.* 7479(1) (PSD "major emitting facility"). That difference reflects the disparate mechanics and purposes of the respective programs. Unlike the NSPS definition, the PSD definition (like other PSD provisions) measures emissions in "tons per year," *id.*, draws the distinction between what a source "emits" and its emissions "capacity," see *New York*, 413 F.3d at 39-40; *Alabama Power*, 636 F.2d at 353, and evinces Congress's intent that PSD, unlike NSPS, be restricted to facilities "which, due to their size, are financially able to bear the substantial regulatory costs imposed by the PSD provisions and which, as a group, are primarily responsible for emission of the deleterious pollutants that befoul our nation's air." *Id.*; see *id.* at 400 n.46; compare 53 Fed. Reg. 5860 (Feb. 26, 1988) (adopting NSPS for residential wood stoves). It is both feasible and important to measure increases in actual emissions from the large sources that count as "major emitting facilities," and PSD's dominant emphasis on the specific, local air quality impacts of these large sources fully justified EPA's decision to predicate PSD applicability and increment consumption on actual, annual emissions. See 45 Fed. Reg. at 52701. Whereas in *Rowan* the agency could offer no *reason* for its different regulations on "wages," here EPA extensively explained the basis for its PSD regulations. That the Fourth Circuit disregarded EPA's rationale, along with the text of the regulations, illustrates just how far it strayed from any proper approach to judicial review. See 42 U.S.C. 7607(d)(7), (9).

Congress's use of the same broadly worded, and general, definition of modification under multiple CAA programs cannot be understood as a mandate that EPA construe these terms without regard to the "different contexts" in which

these undefined terms must function throughout this "technical and complex" statute. *Chevron*, 467 U.S. at 863-64; see *id.* at 845.[36]

In another stark contrast to *Rowan*, 452 U.S. at 254, 263 (citing *Central Illinois*), EPA's PSD regulations were crafted to *conform* to precedent from the court empowered by Congress to review national CAA regulations. *Alabama Power*, 636 F.2d at 353, 399-402 & n. 46; see also *New York*, 413 F.3d at 39-40. And the D.C. Circuit has instructed EPA to do what principles of administrative law would ordinarily require – define a PSD "modification" in a manner faithful to the text of the statutory definition *and* to the textual requirements and programmatic ends of the other PSD provisions with which it must function. The Fourth Circuit's ruling, remarkably, *forbids* EPA from doing so, imposing instead a mandate of obliviousness to context. The Congresses that enacted these elaborate programs surely did not intend that result.[37]

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[36] Congress's refusal to alter the PSD modification provisions in 1990, after EPA had operated for a decade under diverging regulatory definitions for NSPS and NSR, and after *WEPCo*, see *supra*, n. 8, further undermines the Fourth Circuit's conclusion. See *Chevron*, 467 U.S. at 863-864; cf. *Nat'l Mining Ass'n*, 59 F.3d at 1363 (Congress's choices "in 1990" should be construed "against a backdrop of over a decade of skirmishing between the agency and affected companies" when these issues were "very much in the forefront").

[37] The court of appeals' rationale would apply to the NNSR program, which like PSD incorporates the Section 111(a)(4) definition, see 42 U.S.C. 7501(4). It would condemn every iteration of EPA's modification regulations under that major CAA program, see, *e.g.*, 40 C.F.R. 51.165(a)(vi)(A), (a)(vii) (2005), applicable in areas failing to mean the health-based NAAQS. See 42 U.S.C. 7502(c)(5). And it would do so despite unambiguous statutory text measuring NNSR emissions in actual, annual terms. See *supra*, pp. 15-16, 40. See also 42 U.S.C. 7429(g)(3) (modification definition for solid waste incinerators, added in 1990, phrased very similarly to Section 111(a)(4) definition).

C. The Emissions Increase Test Imposed by the Fourth Circuit Violates the Statute.

The effect of the court of appeals' "identical regulations" mandate was to require that EPA use a maximum hourly rate test for PSD – at least until such time as EPA amends its *NSPS* regulations. See Pet. App. 18a.[38] But that test would violate the plain text and fundamental objectives of the Act's PSD provisions and contravene the D.C. Circuit's unappealed decisions in *Alabama Power* and *New York*.

The "plain language of the CAA" requires that EPA "apply NSR to changes that increase actual emissions instead of potential or allowable emissions." *New York*, 413 F.3d at 40. See also *Alabama Power*, 636 F.2d at 353, 400-01. A maximum hourly rate test violates that command. The "amount" of pollutant "emitted" by a source is not merely a function of its maximum hourly rates, but also of how much the plant is in use. See JA 294. Yet the regulatory test improperly imposed by the courts below simply pretends that increases in actual emissions from expanded use do not exist. See Pet. App. 58a-59a; cf. 61 Fed. Reg. at 38269 (effect of Exhibit B proposal "to eliminate a source's level of operations as a factor when determining whether a proposed change will result in an increase" and to "completely disregard[]" utilization). Such an approach is at odds with an entire PSD enactment concerned with changes in actual local air quality, not in engineering potentials or regulatory allowances. See 45 Fed. Reg. at 52700 (potential emissions

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[38] The Fourth Circuit never explained why, even *assuming* the common statutory definitions mandated regulatory identity between NSPS and the PSD, it was the *PSD* regulations that should be condemned, even though those regulations hew to the plain language of the modification definition, fit with PSD-specific provisions of the Act, and were crafted to conform to a decision of the court empowered by Congress to review CAA regulations. See also *New York*, 413 F.3d at 19 (stating that NSPS hourly rate regulation was "possibly inconsistent" with another NSPS regulation that *tracked the statutory definition* of modification) (comparing 40 C.F.R. 60.2(h) (1976) with 40 C.F.R. 60.14(a) (1976)).

test "could permit actual air quality to deteriorate seriously"); 61 Fed. Reg. at 38268-70 (detailing adverse "environmental consequences" of Exhibit B proposal); 67 Fed. Reg. at 80205 (Exhibit B approach "detrimental to air quality").

Nor does such an approach to PSD "modifications" fare well as a matter of "ordinary or natural meaning." *S.D. Warren Co. v. Maine Bd. of Envt'l Protection*, 126 S. Ct. 1843, 1847 (2006) (citation omitted). A major overhaul that enables an old plant to operate, say, ten times as many hours as it could in its prior condition – with a correspondingly large increase in quantities of pollution actually released into the local airshed that is PSD's concern – is, manifestly, a "physical change" that "increases the amount of any air pollutant emitted" by the source. "Were it not for the hundreds of pages of briefing" submitted in the D.C. Circuit and elsewhere trying to impose on PSD accounting methodologies calculated to disregard actual emissions, "one would have thought it fairly clear that this text does not permit" such an approach. *American Trucking*, 531 U.S. at 465. See *New York II*, 443 F.3d at 889.

Ignoring increases in emissions from the expanded operations of "modernized" sources is inconsistent with the limits Congress placed on the grandfathering benefit conferred on existing sources in 1977. As the D.C. Circuit observed in *Alabama Power*, by extending the Act's PSD requirements to "modifications," Congress denied these sources a "perpetual immunity from all standards under the PSD program." 636 F.2d at 400.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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ADDENDUM

TABLE OF CONTENTS

Page

Clean Air Act, ch 360, 69 Stat. 322 (1955), as amended by the Clean Air Act Amendments of 1970, Pub. L. 91-604, 84 Stat. 1676, and by the Clean Air Act Amendments of 1977, Pub. L. 95-95, 91 Stat. 685, and by the Clean Air Act Amendments of 1990, Pub. L. 101-549, 104 Stat. 2399 (codified at 42 U.S.C. §§ 7401 *et seq.*):

42 U.S.C. 7411 (excerpted) 2a
42 U.S.C. 7412 (excerpted) 5a
42 U.S.C. 7471 . . . . . .5a
42 U.S.C. 7472 . . . . . 5a
42 U.S.C. 7473 (excerpted) 6a
42 U.S.C. 7475 (excerpted) 7a
42 U.S.C. 7479 . . . . . .11a
42 U.S.C. 7501 (excerpted) 14a
42 U.S.C. 7502 (excerpted) 14a
42 U.S.C. 7607 (excerpted) 15a

Code of Federal Regulations:

40 C.F.R. 51.166 (1987) (excerpted) 22a
40 C.F.R. 51.166(b)(21) (1993) (excerpted) 33a
40 C.F.R. 60.2, 60.14 (1976)(excerpted) 35a
40 C.F.R. 60.14 (1987) (excerpted) 40a

42 U.S.C. § 7411 [Section 111]

Standards of performance for new stationary sources

(a) Definitions. For purposes of this section:

(1) The term "standard of performance" means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.

(2) The term "new source" means any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source.

(3) The term "stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant. Nothing in subchapter II of this chapter relating to nonroad engines shall be construed to apply to stationary internal combustion engines.

(4) The term "modification" means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

(5) The term "owner or operator" means any person who owns, leases, operates, controls, or supervises a stationary source.

(6) The term "existing source" means any stationary source other than a new source.

* * * * *

(b) List of categories of stationary sources; standards of performance; information on pollution control techniques; sources owned or operated by United States; particular systems; revised standards.

(1) (A) The Administrator shall, within 90 days after December 31, 1970, publish (and from time to time thereafter shall revise) a list of categories of stationary sources. He shall include a category of sources in such list if in his judgment in causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.

* * * * *

(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards.

(3) The Administrator shall, from time to time, issue information on pollution control techniques for categories of new sources and air pollutants subject to the provisions of this section.

* * * * *

(d) Standards of performance for existing sources; remaining useful life of source.

(1) The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 7410 of this title under which each State shall

submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 7408(a) of this title or emitted from a source category which is regulated under section 7412 of this title but (ii) to which a standard of performance under this section would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such standards of performance. Regulations of the Administrator under this paragraph shall permit the State in applying a standard of performance to any particular source under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.

(2) The Administrator shall have the same authority—

(A) to prescribe a plan for a State in cases where the State fails to submit a satisfactory plan as he would have under section 7410(c) of this title in the case of failure to submit an implementation plan, and

(B) to enforce the provisions of such plan in cases where the State fails to enforce them as he would have under sections 7413 and 7414 of this title with respect to an implementation plan.

In promulgating a standard of performance under a plan prescribed under this paragraph, the Administrator shall take into consideration, among other factors, remaining useful lives of the sources in the category of sources to which such standard applies.

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42 U.S.C. § 7412 [Section 112]

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(a)(5) The term "modification" means any physical change in, or change in the method of operation of, a major source which increases the actual emissions of any hazardous air pollutant emitted by such source by more than a de minimis amount or which results in the emission of any hazardous air pollutant not previously emitted by more than a de minimis amount.

* * * * *

42 U.S.C. § 7471 [Section 161]

Plan requirements

In accordance with the policy of section 7401(b)(1) of this title, each applicable implementation plan shall contain emission limitations and such other measures as may be necessary, as determined under regulations promulgated under this part, to prevent significant deterioration of air quality in each region (or portion thereof) designated pursuant to section 7407 of this title as attainment or unclassifiable.

42 U.S.C. § 7472 [Section 162]

Initial classifications

(a) Areas designated as class I

Upon the enactment of this part, all—

(1) international parks,

(2) national wilderness areas which exceed 5,000

acres in size,

(3) national memorial parks which exceed 5,000 acres in size, and

(4) national parks which exceed six thousand acres in size,

and which are in existence on August 7, 1977, shall be class I areas and may not be redesignated. All areas which were redesignated as class I under regulations promulgated before August 7, 1977, shall be class I areas which may be redesignated as provided in this part. The extent of the areas designated as Class I under this section shall conform to any changes in the boundaries of such areas which have occurred subsequent to August 7, 1977, or which may occur subsequent to November 15, 1990.

(b) Areas designated as class II

All areas in such State designated pursuant to section 7407(d) of this title as attainment or unclassifiable which are not established as class I under subsection (a) of this section shall be class II areas unless redesignated under section 7474 of this title.

42 U.S.C. § 7473 [Section 163]

Increments and ceilings

(a) Sulfur dioxide and particulate matter; requirement that maximum allowable increases and maximum allowable concentrations not be exceeded.

In the case of sulfur oxide and particulate matter, each applicable implementation plan shall contain measures assuring that maximum allowable increases over baseline

concentrations of, and maximum allowable concentrations of, such pollutant shall not be exceeded. In the case of any maximum allowable increase (except an allowable increase specified under section 7475(d)(2)(C)(iv) of this title) for a pollutant based on concentrations permitted under national ambient air quality standards for any period other than an annual period, such regulations shall permit such maximum allowable increase to be exceeded during one such period per year.

* * * * *

42 U.S.C. § 7475 [Section 165]

Preconstruction requirements

(a) Major emitting facilities on which construction is commenced. No major emitting facility on which construction is commenced after August 7, 1977, may be constructed in any area to which this part applies unless—

(1) a permit has been issued for such proposed facility in accordance with this part setting forth emission limitations for such facility which conform to the requirements of this part;

(2) the proposed permit has been subject to a review in accordance with this section, the required analysis has been conducted in accordance with regulations promulgated by the Administrator, and a public hearing has been held with opportunity for interested persons including representatives of the Administrator to appear and submit written or oral presentations on the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations;

(3) the owner or operator of such facility demonstrates, as required pursuant to section 7410(j) of this title, that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of any (A) maximum allowable increase or maximum allowable concentration for any pollutant in any area to which this part applies more than one time per year, (B) national ambient air quality standard in any air quality control region, or (C) any other applicable emission standard or standard of performance under this Act;

(4) the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this Act emitted from, or which results from, such facility;

(5) the provisions of subsection (d) of this section with respect to protection of class I areas have been complied with for such facility;

(6) there has been an analysis of any air quality impacts projected for the area as a result of growth associated with such facility;

(7) the person who owns or operates, or proposes to own or operate, a major emitting facility for which a permit is required under this part agrees to conduct such monitoring as may be necessary to determine the effect which emissions from any such facility may have, or is having, on air quality in any area which may be affected by emissions from such source; and

(8) in the case of a source which proposes to construct in a class III area, emissions from which would cause or contribute to exceeding the maximum allowable increments applicable in a class II area and where no standard under section 7411 of this title has been

promulgated subsequent to August 7, 1977, for such source category, the Administrator has approved the determination of best available technology as set forth in the permit.

(b) Exception. The demonstration pertaining to maximum allowable increases required under subsection (a)(3) of this section shall not apply to maximum allowable increases for class II areas in the case of an expansion or modification of a major emitting facility which is in existence on August 7, 1977 whose allowable emissions of air pollutants, after compliance with subsection (a)(4) of this section, will be less than fifty tons per year and for which the owner or operator of such facility demonstrates that emissions of particulate matter and sulfur oxides will not cause or contribute to ambient air quality levels in excess of the national secondary ambient air quality standard for either of such pollutants.

* * * * *

(e) Analysis; continuous air quality monitoring data; regulations; model adjustments.

(1) The review provided for in subsection (a) of this section shall be preceded by an analysis in accordance with regulations of the Administrator, promulgated under this subsection, which may be conducted by the State (or any general purpose unit of local government) or by the major emitting facility applying for such permit, of the ambient air quality at the proposed site and in areas which may be affected by emissions from such facility for each pollutant subject to regulation under this chapter which will be emitted from such facility.

(2) Effective one year after August 7, 1977, the analysis required by this subsection shall include continuous air quality monitoring data gathered for purposes of

determining whether emissions from such facility will exceed the maximum allowable increases or the maximum allowable concentration permitted under this part. Such data shall be gathered over a period of one calendar year preceding the date of application for a permit under this part unless the State, in accordance with regulations promulgated by the Administrator, determines that a complete and adequate analysis for such purposes may be accomplished in a shorter period. The results of such analysis shall be available at the time of the public hearing on the application for such permit.

(3) The Administrator shall within six months after August 7, 1977 promulgate regulations respecting the analysis required under this subsection which regulations—

(A) shall not require the use of any automatic or uniform buffer zone or zones,

(B) shall require an analysis of the ambient air quality, climate and meteorology, terrain, soils and vegetation, and visibility at the site of the proposed major emitting facility and in the area potentially affected by the emissions from such facility for each pollutant regulated under this chapter which will be emitted from, or which results from the construction or operation of, such facility, the size and nature of the proposed facility, the degree of continuous emission reduction which could be achieved by such facility, and such other factors as may be relevant in determining the effect of emissions from a proposed facility on any air quality control region,

(C) shall require the results of such analysis shall be available at the time of the public hearing on the application for such permit, and

(D) shall specify with reasonable particularity each air quality model or models to be used under specified sets of conditions for purposes of this part.

Any model or models designated under such regulations may be adjusted upon a determination, after notice and opportunity for public hearing, by the Administrator that such adjustment is necessary to take into account unique terrain or meteorological characteristics of an area potentially affected by emissions from a source applying for a permit required under this part.

42 U.S.C. § 7479 [Section 169]

Definitions

For purposes of this part—

(1) The term "major emitting facility" means any of the following stationary sources of air pollutants which emit, or have the potential to emit, one hundred tons per year or more of any air pollutant from the following types of stationary sources: fossil-fuel fired steam electric plants of more than two hundred and fifty million British thermal units per hour heat input, coal cleaning plants (thermal dryers), kraft pulp mills, Portland Cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than fifty tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production facilities, chemical process plants, fossil-fuel boilers of more than two hundred and fifty million British thermal units per hour heat input, petroleum

storage and transfer facilities with a capacity exceeding three hundred thousand barrels, taconite ore processing facilities, glass fiber processing plants, charcoal production facilities. Such term also includes any other source with the potential to emit two hundred and fifty tons per year or more of any air pollutant. This term shall not include new or modified facilities which are nonprofit health or education institutions which have been exempted by the State.

(2) (A) The term "commenced" as applied to construction of a major emitting facility means that the owner or operator has obtained all necessary preconstruction approvals or permits required by Federal, State, or local air pollution emissions and air quality laws or regulations and either has (i) begun, or caused to begin, a continuous program of physical on-site construction of the facility or (ii) entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of construction of the facility to be completed within a reasonable time.

(B) The term "necessary preconstruction approvals or permits" means those permits or approvals, required by the permitting authority as a precondition to undertaking any activity under clauses (i) or (ii) of subparagraph (A) of this paragraph.

(C) The term "construction" when used in connection with any source or facility, includes the modification (as defined in section 7411(a) of this title) of any source or facility.

(3) The term "best available control technology" means an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this Act emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case

basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant. In no event shall application of "best available control technology" result in emissions of any pollutants which will exceed the emissions allowed by any applicable standard established pursuant to section 7411 or 7412 of this title. Emissions from any source utilizing clean fuels, or any other means, to comply with this paragraph shall not be allowed to increase above levels that would have been required under this paragraph as it existed prior to November 15, 1990.

(4) The term "baseline concentration" means, with respect to a pollutant, the ambient concentration levels which exist at the time of the first application for a permit in an area subject to this part, based on air quality data available in the Environmental Protection Agency or a State air pollution control agency and on such monitoring data as the permit applicant is required to submit. Such ambient concentration levels shall take into account all projected emissions in, or which may affect, such area from any major emitting facility on which construction commenced prior to January 6, 1975, but which has not begun operation by the date of the baseline air quality concentration determination. Emissions of sulfur oxides and particulate matter from any major emitting facility on which construction commenced after January 6, 1975, shall not be included in the baseline and shall be counted against the maximum allowable increases in pollutant concentrations established under this part.

42 U.S.C. § 7501 [Section 171]

Definitions

For the purposes of this part—

* * * * *

(2) Nonattainment area. The term "nonattainment area" means, for any air pollutant, an area which is designated "nonattainment" with respect to that pollutant within the meaning of section 7407(d) of this title.

* * * * *

(4) The terms "modifications" and "modified" mean the same as the term "modification" as used in section 7411(a)(4) of this title.

42 U.S.C. § 7502 [Section 172]

Nonattainment plan provisions in general

* * * * *

(c) Nonattainment plan provisions. The plan provisions (including plan items) required to be submitted under this part shall comply with each of the following:

> (1) In general. Such plan provisions shall provide for the implementation of all reasonably available control measures as expeditiously as practicable (including such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology) and shall provide for attainment of the national primary ambient air

quality standards.

* * * * *

(3) Inventory. Such plan provisions shall include a comprehensive, accurate, current inventory of actual emissions from all sources of the relevant pollutant or pollutants in such area, including such periodic revisions as the Administrator may determine necessary to assure that the requirements of this part are met.

* * * * *

42 U.S.C. § 7607 [Section 307]

Administrative proceedings and judicial review

* * * * *

(b) Judicial review.

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this Act may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's

action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412 of this title, under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or revising regulations for enhanced monitoring and compliance certification programs under section 7414(a)(3) of this titlet, or any other final action of the Administrator under this Act (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement. Where a final decision by the Administrator defers performance of any nondiscretionary statutory action to a later time, any person may challenge the deferral pursuant to paragraph (1).

(c) Additional evidence. In any judicial proceeding in which review is sought of a determination under this Act required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as to the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence.

(d) Rulemaking.

* * * * *

(2) Not later than the date of proposal of any action to which this subsection applies, the Administrator shall establish a rulemaking docket for such action (hereinafter in this subsection referred to as a "rule"). Whenever a rule applies only within a particular State, a second (identical)

docket shall be simultaneously established in the appropriate regional office of the Environmental Protection Agency.

(3) In the case of any rule to which this subsection applies, notice of proposed rulemaking shall be published in the Federal Register, as provided under section 553(b) of title 5, shall be accompanied by a statement of its basis and purpose and shall specify the period available for public comment (hereinafter referred to as the "comment period"). The notice of proposed rulemaking shall also state the docket number, the location or locations of the docket, and the times it will be open to public inspection. The statement of basis and purpose shall include a summary of—

(A) the factual data on which the proposed rule is based;

(B) the methodology used in obtaining the data and in analyzing the data; and

(C) the major legal interpretations and policy considerations underlying the proposed rule.

The statement shall also set forth or summarize and provide a reference to any pertinent findings, recommendations, and comments by the Scientific Review Committee established under section 7409(d) of this title and the National Academy of Sciences, and, if the proposal differs in any important respect from any of these recommendations, an explanation of the reasons for such differences. All data, information, and documents referred to in this paragraph on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule.

* * * * *

(5) In promulgating a rule to which this subsection applies (i) the Administrator shall allow any person to submit written comments, data, or documentary information; (ii) the Administrator shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions; (iii) a transcript shall be kept of any oral presentation; and (iv) the Administrator shall keep the record of such proceeding open for thirty days after completion of the proceeding to provide an opportunity for submission of rebuttal and supplementary information.

(6) (A) The promulgated rule shall be accompanied by (i) a statement of basis and purpose like that referred to in paragraph (3) with respect to a proposed rule and (ii) an explanation of the reasons for any major changes in the promulgated rule from the proposed rule.

(B) The promulgated rule shall also be accompanied by a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period.

(C) The promulgated rule may not be based (in part or whole) on any information or data which has not been placed in the docket as of the date of such promulgation.

(7) (A) The record for judicial review shall consist

exclusively of the material referred to in paragraph (3), clause (i) of paragraph (4)(B), and subparagraphs (A) and (B) of paragraph (6).

(B) Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b)). Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.

(8) The sole forum for challenging procedural determinations made by the Administrator under this subsection shall be in the United States court of appeals for the appropriate circuit (as provided in subsection (b)) at the time of the substantive review of the rule. No interlocutory appeals shall be permitted with respect to such procedural determinations. In reviewing alleged procedural errors, the court may invalidate the rule only *if* the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.

(9) In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or

(D) without observance of procedure required by law, if (i) such failure to observe such procedure is arbitrary or capricious, (ii) the requirement of paragraph (7)(B) has been met, and (iii) the condition of the last sentence of paragraph (8) is met.

(10) Each statutory deadline for promulgation of rules to which this subsection applies which requires promulgation less than six months after date of proposal may be extended to not more than six months after date of proposal by the Administrator upon a determination that such extension is necessary to afford the public, and the agency, adequate opportunity to carry out the purposes of this subsection.

(11) The requirements of this subsection shall take effect with respect to any rule the proposal of which occurs after August 7, 1977.

(e) Other methods of judicial review not authorized. Nothing in this Act shall be construed to authorize judicial review of regulations or orders of the Administrator under this Act, except as provided in this section.

40 C.F.R. § 51.166 (1987)

TITLE 40 – Protection of Environment
CHAPTER I – Environmental Protection Agency
SUBCHAPTER C –Air Programs

Part 51—Requirements for Preparation, Adoption, and Submittal of Implementation Plans
Subpart I—Review of New Sources and Modifications

§ 51.166 Prevention of significant deterioration of air quality.

(a) (1) *Plan requirements.* In accordance with the policy of section 101(b)(1) of the act and the purposes of section 160 of the Act, each applicable State implementation plan shall contain emission limitations and such other measures as may be necessary to prevent significant deterioration of air quality.

(2) Plan Revisions. If a State Implementation Plan revision would result in increased air quality deterioration over any baseline concentration, the plan revision shall include a demonstration that it will not cause or contribute to a violation of the applicable increment(s). If a plan revision proposing less restrictive requirements was submitted after August 7, 1977 but on or before any applicable baseline date and was pending action by the Administrator on that date, no such demonstration is necessary with respect to the area for which a baseline date would be established before final action is taken on the plan revision. Instead, the assessment described in paragraph (a)(4) of this section, shall review the expected impact to the applicable increment(s).

(3) Required plan revision. If the State or the

Administrator determines that a plan is substantially inadequate to prevent significant deterioration or that an applicable increment is being violated, the plan shall be revised to correct the inadequacy or the violation. The plan shall be revised within 60 days of such a finding by a State or within 60 days following notification by the Administrator, or by such later date as prescribed by the Administrator after consultation with the State.

(4) Plan assessment. The State shall review the adequacy of a plan on a periodic basis and within 60 days of such time as information becomes available that an applicable increment is being violated.

(5) Public participation. Any State action taken under this paragraph shall be subject to the opportunity for public hearing in accordance with procedures equivalent to those established in § 51.102.

* * * * *

(b) *Definitions.* All state plans shall use the following definitions for the purposes of this section. Deviations from the following wording will be approved only if the state specifically demonstrates that the submitted definition is more stringent, or at least as stringent, in all respects as the corresponding definitions below:

(1)(i) "Major stationary source" means:

(a) Any of the following stationary sources of air pollutants which emits, or has the potential to emit, 100 tons per year or more of any pollutant subject to regulation under the Act: Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input, coal cleaning plants (with thermal dryers), kraft pulp mills,

portland cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than 250 tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production plants, chemical process plants, fossil fuel boilers (or combinations thereof) totaling more than 250 million British thermal units per hour heat input, petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels, taconite ore processing plants, glass fiber processing plants, and charcoal production plants;

(b) Notwithstanding the stationary source size specified in paragraph (b)(1)(i)*(a)* of this section, any stationary source which emits, or has the potential to emit, 250 tons per year or more of any air pollutant subject to regulation under the Act; or

(c) Any physical change that would occur at a stationary source not otherwise qualifying under paragraph (b)(1) of this section, as a major stationary source if the change would constitute a major stationary source by itself.

* * * * *

(2)(i) "Major modification" means any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act.

(ii) Any net emissions increase that is significant for volatile organic compounds shall be considered significant for ozone.

(iii) A physical change or change in the method of operation shall not include:

(*a*) Routine maintenance, repair, and replacement;

* * * * *

(*f*) An increase in the hours of operation or in the production rate, unless such change would be prohibited under any federally enforceable permit condition which was established after January 6, 1975, pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR Subpart I or § 51.166.

(*g*) Any change in ownership at a stationary source.

(3)(i) "Net emissions increase" means the amount by which the sum of the following exceeds zero:

(*a*) Any increase in actual emissions from a particular physical change or change in the method of operation at a stationary source; and

(*b*) Any other increases and decreases in actual emissions at the source that are contemporaneous with the particular change and are otherwise creditable.

(ii) An increase or decrease in actual emissions is

contemporaneous with the increase from the particular change only if it occurs within a reasonable period (to be specified by the state) before the date that the increase from the particular change occurs.

(iii) An increase or decrease in actual emissions is creditable only if the reviewing authority has not relied on it in issuing a permit for the source under regulations approved pursuant to this section, which permit is in effect when the increase in actual emissions from the particular change occurs.

(iv) An increase or decrease in actual emissions of sulfur dioxide or particulate matter which occurs before the applicable baseline date is creditable only if it is required to be considered in calculating the amount of maximum allowable increases remaining available.

(v) An increase in actual emissions is creditable only to the extent that the new level of actual emissions exceeds the old level.

(vi) A decrease in actual emissions is creditable only to the extent that:

(*a*) The old level of actual emissions or the old level of allowable emissions, whichever is lower, exceeds the new level of actual emissions;

(*b*) It is federally enforceable at and after the time that actual construction on the particular change begins; and

(*c*) It has approximately the same qualitative significance for public health and welfare as that attributed to the increase from the particular change.

* * * * *

(8) "Construction" means any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) which would result in a change in actual emissions.

* * * * *

(13)(i) "Baseline concentration" means that ambient concentration level which exists in the baseline area at the time of the applicable baseline date. A baseline concentration is determined for each pollutant for which a baseline date is established and shall include:

(*a*) The actual emissions representative of sources in existence on the applicable baseline date, except as provided in paragraph (b)(13)(ii) of this section;

* * * * *

(21) (i) "Actual emissions" means the actual rate of emissions of a pollutant from an emissions unit, as determined in accordance with paragraphs (b)(21)(ii) through (iv) of this section.

(ii) In general, actual emissions as of a particular date shall equal the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period which precedes the particular date and which is representative of normal source operation. The reviewing authority may allow the use of a different time period upon a determination that it is more representative of normal source operation. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period.

(iii) The reviewing authority may presume that source-specific allowable emissions for the unit are equivalent to the actual emissions of the unit.

(iv) For any emissions unit which has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.

* * * * *

(23)(i) "Significant" means, in reference to a net emissions increase or the potential of a source to emit any of the following pollutants, a rate of emissions that would equal or exceed any of the following rates:

Pollutant and Emissions Rate

Carbon monoxide: 100 tons per year (tpy)
Nitrogen oxides: 40 tpy
Sulfur dioxide: 40 tpy
Particulate matter: 25 tpy of particulate matter emissions.
15 tpy of PM_{10} emissions.
Ozone: 40 tpy of volatile organic compounds
Lead. 0.6 tpy
Asbestos: 0.007 tpy
Beryllium: 0.0004 tpy
Mercury: 0.1 tpy
Vinyl chloride: 1 tpy
Fluorides: 3 tpy
Sulfuric acid mist: 7 tpy
Hydrogen sulfide (H_2S): 10 tpy
Total reduced sulfur (including H_2S): 10 tpy
Reduced sulfur compounds (including H_2S): 10 tpy

* * * * *

(c) *Ambient air increments.* The plan shall contain emission limitations and such other measures as may be necessary to assure that in areas designated as Class I, II, or III, increases in pollutant concentration over the base-line concentration shall be limited to the following:

Maximum allowable increase (micrograms per cubic Pollutant meter)

CLASS I

Particulate matter:	
TSP, annual geometric mean	5
TSP, 24-hr maximum	10
Sulfur dioxide:	
Annual arithmetic mean	2
24-hr maximum	5
3-hr maximum	25

CLASS II

Particulate matter:	
TSP, annual geometric mean	19
TSP, 24-hr maximum	37
Sulfur dioxide:	
Annual arithmetic mean	20
24-hr maximum	91
3-hr maximum	512

CLASS III

Particulate matter:	
TSP, annual geometric mean	37
TSP, 24-hr maximum	75
Sulfur dioxide:	
Annual arithmetic mean	40
24-hr maximum	182
3-hr maximum	700

For any period other than an annual period, the applicable

maximum allowable increase may be exceeded during one such period per year at any one location.

(d) *Ambient air ceilings.* The plan shall provide that no concentration of a pollutant shall exceed:

(1) The concentration permitted under the national secondary ambient air quality standard, or

(2) The concentration permitted under the national primary ambient air quality standard, whichever concentration is lowest for the pollutant for a period of exposure.

* * * * *

(i) *Review of major stationary sources and major modifications – source applicability and exemptions.*

* * * * *

(7) The plan may provide that requirements equivalent to those contained in paragraphs (k), (m), and (o) of this section as they relate to any maximum allowable increase for a Class II area do not apply to a modification of a major stationary source that was in existence on March 1, 1978, if the net increase in allowable emissions of each pollutant subject to regulation under the Act from the modification after the application of best available control technology would be less than 50 tons per year.

* * * * *

(k) *Source impact analysis.* The plan shall provide that the owner or operator of the proposed source or modification shall demonstrate that allowable emission increases from the proposed source or modification, in conjunction with all other

applicable emissions increases or reduction (including secondary emissions) would not cause or contribute to air pollution in violation of:

(1) Any national ambient air quality standard in any air quality control region; or

(2) Any applicable maximum allowable increase over the baseline concentration in any area.

* * * * *

(m) *Air quality analysis* – (1) Preapplication analysis. (i) The plan shall provide that any application for a permit under regulations approved pursuant to this section shall contain an analysis of ambient air quality in the area that the major stationary source or major modification would affect for each of the following pollutants:

(*a*) For the source, each pollutant that it would have the potential to emit in a significant amount;

(*b*) For the modification, each pollutant for which it would result in a significant net emissions increase.

* * * * *

(2) Post-construction monitoring. The plan shall provide that the owner or operator of a major stationary source or major modification shall, after construction of the stationary source or modification, conduct such ambient monitoring as the reviewing authority determines is necessary to determine the effect emissions from the stationary source or modification may have, or are having, on air quality in any area.

40 C.F.R. § 51.166(b)(21), (32) (1993) (as added by 57 Fed. Reg. 32314, 32335 (July 21, 1992))

(b)(21):

* * * * *

(iv) For any emissions unit (other than an electric utility steam generating unit specified in paragraph (b)(21)(v) of this section) which has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.

(v) For an electric utility steam generating unit (other than a new unit or the replacement of an existing unit) actual emissions of the unit following the physical or operational change shall equal the representative actual annual emissions of the unit following the physical or operational change, provided the source owner or operator maintains and submits to the reviewing authority, on an annual basis for a period of 5 years from the date the unit resumes regular operation, information demonstrating that the physical or operational change did not result in an emissions increase. A longer period, not to exceed 10 years, may be required by the reviewing authority if it determines such a period to be more representative of normal source post-change operations.

* * * * *

(b)(32) Representative actual annual emissions means the average rate, in tons per year, at which the source is projected to emit a pollutant for the two-year period after a physical change or change in the method of operation of a unit, (or a

different consecutive two-year period within 10 years after that change, where the reviewing authority determines that such period is more representative of normal source operations), considering the effect any such change will have on increasing or decreasing the hourly emissions rate and on projected capacity utilization. In projecting future emissions the reviewing authority shall:

(i) Consider all relevant information, including but not limited to, historical operational data, the company's own representations, filings with the State or Federal regulatory authorities, and compliance plans under title IV of the Clean Air Act; and

(ii) Exclude, in calculating any increase in emissions that results from the particular physical change or change in the method of operation at an electric utility steam generating unit, that portion of the unit's emissions following the change that could have been accommodated during the representative baseline period and is attributable to an increase in projected capacity utilization at the unit that is unrelated to the particular change, including any increased utilization due to the rate of electricity demand growth for the utility system as a whole.

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60 C.F.R. 60.2, 60.14 (1976)

Title 40—Protection of Environment
Chapter I—Environmental Protection Agency
Subchapter C—Air Programs

[FRL 402-8]

PART 60—STANDARDS OF PERFORMANCE FOR NEW STATIONARY SOURCES

Modification, Notification, and Reconstruction

* * * * *

§ 60.2 Definitions.

* * * * *

(h) "Modification" means any physical change in, or change in the method of operation of, an existing facility which increases the amount of any air pollutant (to which a standard applies) emitted into the atmosphere by that facility or which results in the emission of any air pollutant (to which a standard applies) into the atmosphere not previously emitted.

* * * * *

§ 60.14 Modification.

(a) Except as provided under paragraphs (d), (e) and (f) of this section, any physical or operational change to an existing facility which results in an increase in the emission rate to the atmosphere of any pollutant to which a standard applies shall be considered a modification with the meaning of section 111 of the Act. Upon modification, an existing facility shall become an affected facility for each pollutant to which a standard applies and for which there is an increase in the

emission rate to the atmosphere.

(b) Emission rate shall be expressed as kg/hr of any pollutant discharged into the atmosphere for which a standard is applicable. The Administrator shall use the following to determine emission rate:

(1) Emission factors as specified in the latest issue of "Compilation of Air Pollutant Emission Factors," EPA Publication No. AP-42, or other emission factors determined by the Administrator to be superior to AP-42 emission factors, in cases where utilization of, emission factors demonstrate that the emission level resulting from the physical or operational change will either clearly increase or clearly not increase.

(2) Material balances, continuous monitor data, or manual emission tests in cases where utilization of emission factors as referenced in paragraph (b)(1) of this section does not demonstrate to the Administrator's satisfaction whether the emission level resulting from the physical or operational change will either clearly increase or clearly not increase, or where an owner or operator demonstrates to the Administrator's satisfaction that there are reasonable grounds to dispute the result obtained by the Administrator utilizing emission factors as referenced in paragraph (b)(1) of this section. When the emission rate is based on results from manual emission tests or continuous monitoring systems, the procedures specified in Appendix C of this part shall be used to determine whether an increase in emission rate has occurred. Tests shall be conducted under such conditions as the Administrator shall specify to the owner or operator based on representative performance of the facility. At least three valid test runs must be conducted before and at least three after the physical or operational change. All operating

parameters which may affect emissions must be held constant to the maximum feasible degree for all test runs.

(c) The addition of an affected facility to a stationary source as an expansion to that source or as a replacement for an existing facility shall not by itself bring within the applicability of this part any other facility within that source.

(d) A modification shall not be deemed to occur if an existing facility undergoes a physical or operational change where the owner or operator demonstrates to the Administrator's satisfaction (by any of the procedures prescribed under paragraph (b) of this section) that the total emission rate of any pollutant has not increased from all facilities within the stationary source to which appropriate reference, equivalent, or alternative methods, as defined in § 60.2(s), (t) and (u), can be applied. An owner or operator may completely and permanently close any facility within a stationary source to prevent an increase in the total emission rate regardless of whether such reference, equivalent, or alternative method can be applied, if the decrease in emission rate from such closure can be adequately determined by any of the procedures prescribed under paragraph (b) of this section. The owner or operator of the source shall have the burden of demonstrating compliance with this section.

(1) Such demonstration shall be in writing and shall include: (i) The name and address of the owner or operator.

(ii) The location of the stationary source.

(iii) A complete description of the existing facility undergoing the physical or operational change resulting in an increase in emission rate, any applicable control system, and the physical or

operational change to such facility.

(iv) The emission rates into the atmosphere from the existing facility of each pollutant to which a standard applies determined before and after the physical or operational change takes place, to the extent such information is known or can be predicted.

(v) A complete description of each facility and the control systems, if any, for those facilities within the stationary source where the emission rate of each pollutant in question will be decreased to compensate for the increase in emission rate from the existing facility undergoing the physical or operational change.

(vi) The emission rates into the atmosphere of the pollutants in question from each facility described under paragraph (d)(1)(v) of this section both before and after the improvement or installation of any applicable control system or any physical or operational changes to such facilities to reduce emission rate.

(vii) A complete description of the procedures and methods used to determine the emission rates.

(2) Compliance with paragraph (d) of this section may be demonstrated by the methods listed in paragraph (b) of this section, where appropriate. Decreases in emissions resulting from requirements of a State implementation plan approved or promulgated under Part 52 of this chapter will not be acceptable. The required reduction in emission rate may be accomplished through the installation or improvement of a control system or through physical or operational

changes to facilities including reducing the production of a facility or closing a facility.

(3) Emission rates established for the existing facility which is undergoing a physical or operational change resulting in an increase in the emission rate, and established for the facilities described under paragraph (d)(1)(v) of this section shall become the baseline for determining whether such facilities undergo a modification or are in compliance with standards.

(4) Any emission rate in excess of that rate established under paragraph (d)(3) of this section shall be in violation of these regulations except as otherwise provided in paragraph (e) of this section. However, any owner or operator electing to demonstrate compliance under this paragraph (d) must apply to the Administrator to obtain the use of any exemptions under paragraphs (e)(2), (e)(3), and (e)(4) of this section. The Administrator will grant such exemption only if, in his judgment, the compliance originally demonstrated under this paragraph will not be circumvented or nullified by the utilization of the exemption.

(5) The Administrator may require the use of continuous monitoring devices and compliance with necessary reporting procedures for each facility described in paragraph (d)(1)(iii) and (d)(1)(v) of this section.

(e) The following shall not, by themselves, be considered modifications under this part:

(1) Maintenance, repair, and replacement which the Administrator determines to be routine for a source category, subject to the provisions of paragraph (c) of

this section and § 60.15.

(2) An increase in production rate of an existing facility, if that increase can be accomplished without a capital expenditure on the stationary source containing the facility.

(3) An increase in the hours of operation.

* * * * *

40 C.F.R. § 60.14 (1987)

TITLE 40 – Protection of Environment
CHAPTER I – Environmental Protection Agency
SUBCHAPTER C –Air Programs

Part 60—Standards of Performance for New Stationary Sources

Subpart A—General Provisions

§ 60.14 Modification.

(a) Except as provided under paragraphs (e) and (f) of this section, any physical or operational change to an existing facility which results in an increase in the emission rate to the atmosphere of any pollutant to which a standard applies shall be considered a modification within the meaning of section 111 of the Act. Upon modification, an existing facility shall become an affected facility for each pollutant to which a standard applies and for which there is an increase in the emission rate to the atmosphere.

(b) Emission rate shall be expressed as kg/hr of any pollutant discharged into the atmosphere for which a standard is applicable. The Administrator shall use the following to

determine emission rate:

(1) Emission factors as specified in the latest issue of "Compilation of Air Pollutant Emission Factors," EPA Publication No. AP-42, or other emission factors determined by the Administrator to be superior to AP-42 emission factors, in cases where utilization of emission factors demonstrate that the emission level resulting from the physical or operational change will either clearly increase or clearly not increase.

(2) Material balances, continuous monitor data, or manual emission tests in cases where utilization of emission factors as referenced in paragraph (b) (1) of this section does not demonstrate to the Administrator's satisfaction whether the emission level resulting from the physical or operational change will either clearly increase or clearly not increase, or where an owner or operator demonstrates to the Administrator's satisfaction that there are reasonable grounds to dispute the result obtained by the Administrator utilizing emission factors as referenced in paragraph (b)(1) of this section. When the emission rate is based on results from manual emission tests or continuous monitoring systems, the procedures specified in Appendix C of this part shall be used to determine whether an increase in emission rate has occurred. Tests shall be conducted under such conditions as the Administrator shall specify to the owner or operator based on representative performance of the facility. At least three valid test runs must be conducted before and at least three after the physical or operational change. All operating parameters which may affect emissions must be held constant to the maximum feasible degree for all test runs.

(c) The addition of an affected facility to a stationary source as an expansion to that source or as a replacement for an existing facility shall not by itself bring within the applicability of this part any other facility within that source.

(d) [Reserved]

(e) The following shall not, by themselves, be considered modifications under this part:

(1) Maintenance, repair, and replacement which the Administrator determines to be routine for a source category, subject to the provisions of paragraph (c) of this section and § 60.15.

(2) An increase in production rate of an existing facility, if that increase can be accomplished without a capital expenditure on that facility.

(3) An increase in the hours of operation.

* * * * *